



JULIANA CORREIA DA SILVA ALMEIDA

**CURRICULAR INTERNSHIP IN THE PERMANENT
MISSION OF PORTUGAL TO THE UNITED NATIONS**

**The activation of the jurisdiction of the International
Criminal Court over the crime of aggression**

Relatório de Estágio com vista à
obtenção do grau de Mestre em
Direito, na especialidade de Direito
Internacional e Europeu.

Mentor:

Professor Jeremy Sarkin

Faculdade de Direito da Universidade Nova de Lisboa

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PLAGIARISM DECLARATION

In accordance with Article 20º-A of *Regulamento do 2.º Ciclo de Estudos Conducente ao Grau de Mestre em Direito*, I solemnly declare that I am the exclusive author of the work hereby presented, the content of which is original. I further declare that all external sources and citations used for this work are duly referred and identified. I also understand that the use of non-identified external elements within an academic work amounts to a serious ethical and disciplinary breach.

Lisbon, 14 March 2018

Signature

Juliana Almeida

ACKNOWLEDGMENTS

I offer my deep gratitude:

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To my amazing family, for the constant support, the constant comedy and the constant love. This is for you.

CITATION STYLE

- a) The first citation of books will include: name of the author, title of the work, edition, local of publication, publisher, date, and the relevant pages to the information being analysed;
- b) The first citation of journal articles will include: name of the author, title of the work, name of the journal, volume, number, date, and the relevant pages to the information being analysed. The hyperlink of where it is available and the date of last access will be included in the bibliography;
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- f) In the case of legislation, jurisprudence or other official documents, these will include: name of the adopting or deciding body (e.g. UNGA), type of document (e.g. resolution), number, date, subject when applicable, and the hyperlink where it is available;
- g) Abbreviations or acronyms are identified in the list of acronyms that immediately follows;
- h) Expressions in Latin or in a foreign language will be presented in italic;
- i) The bibliography was completed according to *Norma Portuguesa* (NP) 405.

NUMBER OF CHARACTERS

The main text body of this report, including notes and spaces, presents a total of 180 742 characters.

LIST OF ACRONYMS

AU	African Union
ASP	Assembly of States Parties
CAR	Central African Republic
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
EU EOM	European Union Electoral Observation Mission
ICC	International Criminal Court
ICJ	International Court of Justice
IDPs	Internally Displaced Persons
ILC	International Law Commission
IMT	International Military Tribunal
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of Congo
NEC	National Electoral Commission
OP	Operative Paragraph
<i>op. cit.</i>	<i>opere citato</i> /cited work
p.	Page
para.	Paragraph
PBF	Peacebuilding Fund
pp.	Pages

P5	Permanent Five Members of the United Nations Security Council
RC	Review Conference
Res.	Resolution
SDGs	Sustainable Development Goals
SWGCA	Special Working Group on the Crime of Aggression
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNISS	United Nations Integrated Strategy for the Sahel
UNMIL	United Nations Observer Mission in Liberia
UNPBC	United Nations Peacebuilding Commission
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
USA	United States of America
VCLT	Vienna Convention of the Law of Treaties
WGA	Working Group on Amendments

ABSTRACT

On 14 December 2017, the Assembly of States Parties (ASP) of the International Criminal Court (ICC) gathered in New York and took an historic decision to activate the jurisdiction of the Court over the crime of aggression.

By firstly describing the 4-month internship at the Permanent Mission of Portugal to the United Nations, this paper intends to set the context in which the activation was carried out and explain the choosing of the crime of aggression as the specific subject-matter. Indeed, this has been a discussion taking place since Nuremberg and that has, in the past 60 years, slowly been integrated in the international legal order. By analysing the historic background that led to the Rome Statute and then to the Kampala amendments, the aim is to understand what was at stake when the decision was made on 14 December 2017 and the different ramifications of the legal system.

Finally, this paper will focus on the scope of protection granted by the regime of the crime of aggression, that excludes non-States Parties and non-ratifying States Parties from the jurisdiction of the ICC. Such conclusion represents a true reversal of the international criminal justice paradigm that is represented by the ICC and will undermine the fight against impunity and the protection of human rights, even though the importance of the decision achieved at the ASP, by consensus, to the world today cannot be understated.

Key-words: crime of aggression, International Criminal Court, United Nations, Curricular Internship

RESUMO

A 14 de dezembro de 2017, a Assembleia de Estados Parte (AEP) do Tribunal Penal Internacional (TPI), reunida em Nova Iorque, adotou a decisão histórica para ativar a jurisdição do tribunal sobre o crime de agressão.

Inicialmente, através da descrição da realização do estágio de 4 meses na Missão Permanente de Portugal junto das Nações Unidas, este relatório tenciona apresentar qual o contexto que se revelou propício a esta decisão de ativação e explicar a razão pela qual o crime de agressão foi escolhido como tema principal. De facto, a discussão sobre o crime de agressão começa em Nuremberga e tem sido lentamente integrada na ordem internacional durante os últimos 60 anos. Através da análise do contexto histórico que levou até ao Estatuto de Roma e depois até às emendas de Kampala, o objetivo é perceber o que estava em causa quando a decisão foi tomada e quais as diferentes ramificações do sistema legal.

Finalmente, este relatório focar-se-á no âmbito de proteção concedido pelo regime do crime de agressão, que exclui Estados Não-Parte e Estados Não-Ratificantes da jurisdição do TPI. Tal conclusão representa uma reversão total do paradigma de justiça penal internacional do TPI e prejudica a luta contra a impunidade e a proteção de direitos humanos, mesmo que não possamos ignorar a importância da decisão tomada por consenso pela Assembleia de Estados-Parte para o mundo de hoje.

Palavras-chave: crime de agressão, Tribunal Penal Internacional, Organização das Nações Unidas, Estágio Curricular

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The world legal order is jeopardized every time any nation, unilaterally or in coalitions, takes the law into its own hands.

Benjamin B. Ferencz

Chief Prosecutor for the United States
in *The Einsatzgruppen Case*; supporter
of the International Criminal Court and
the criminalisation of aggression

INTRODUCTION

This report describes the internship completed in the Permanent Mission of Portugal to the United Nations, in New York, with the duration of four months. It consists of an account of the work carried out, followed by a critical analysis of a specific subject, with relevance for both the internship itself and the Master of International and European Law, under which the internship was completed. The subject chosen relates to the crime of aggression under the international legal order.

The activation of the jurisdiction of the International Criminal Court (ICC) over the crime of aggression in 2017 represented a major step in the development of international criminal justice since the adoption of the Rome Statute in 1998¹.

In truth, the criminalisation of aggression has been pursued throughout the twentieth century to recognise criminal responsibility to individuals in power, responsible for the waging of aggressive wars. Starting in Nuremberg in 1945, this process has been highly politicised and has found several obstacles, mainly related with the sovereignty of States, specifically the requirement of State consent, and the role of the United Nations Security Council (UNSC). With the adoption of the Rome Statute, little development was made in this particular matter, and only in 2010, in the Review Conference (RC) held in Kampala, Uganda, was the international community able to achieve some breakthroughs regarding the crime of aggression.

Effectively, the Kampala amendments to the Rome Statute² include a definition on the crime of aggression and a delimitation of the role of the UNSC in the finding of an act of aggression, something that was previously impossible to agree on. However, it simultaneously created a new jurisdictional regime, by

¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Statute of the International Criminal Court, UN Doc A/Conf.183/9 (1998), 17 July 1998, entered into force on 1 July 2002, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/RomeStatute-ENG.pdf.

² RC Res. 6* (11 Jun. 2010), on the crime of aggression, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

excluding non-States Parties and non-ratifying States Parties from the jurisdiction of the Court, which led to a fundamental divergence of positions considering the legal ramifications of both the Rome Statute and the Kampala amendments.

Additionally, these amendments also established a delay in the beginning of the exercise of jurisdiction by the Court until three conditions would be met: i) the obtaining of 30 ratifications of the amendments, ii) a decision taken by the Assembly of States Parties (ASP) on this matter, and iii) only after 1 January 2017.

Hence, the 16th session of the ASP held in New York, in December 2017, proved to be the ideal opportunity for the discussion of the remaining challenges that plagued the regime of the crime of aggression and the subsequent adoption of the required decision. As such, on 14 December 2017³, a Resolution activating the jurisdiction of the ICC over the crime of aggression was adopted by consensus⁴.

Ultimately, because of the challenges represented by the criminalisation of aggression in the international legal order and the fact that the 16th session of the ASP represented such a diplomatic achievement, the activation of the jurisdiction of the ICC over the crime of aggression was chosen as the subject of this paper.

When in contact with this issue, it was fascinating to see how States Parties demonstrated interest and political will to activate the jurisdiction in 2017, while at the same time disagreed fundamentally on this question. In fact, while at times, there was hope that 2017 would be finally be the year of activation, often the feeling was that consensus could not be reached and the effective inclusion of the crime of aggression in international criminal law seemed impossible.

The report has four main parts. The first part deals specifically with the internship at the Portuguese Mission, by presenting an overview and a description of the functions and tasks assigned. This includes an exposition about the several

³ Unofficially, on 15 December 2017, at 00:40, but the clock had to be stopped at midnight to allow the adoption of the remaining reports.

⁴ ASP Res. ICC-ASP/16/Res.5 (14 Dec. 2017), on the activation of the jurisdiction of the Court over the crime of aggression, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf.

committees attended and the choice of some specific matters that were dealt with to develop further.

Subsequently, the second and third parts will focus especially on the crime of aggression. The second part of this report describes the crime of aggression under international law and its evolution, especially in the past twenty years, considering the legal interpretations that came out of the Kampala amendments. The third part presents the work carried out during 2017 to lead to an activation decision, by describing the process in first hand and commenting it critically. Immediately following will be the fourth part that presents some final considerations about the ICC system as a whole, taking into account the crime of aggression regime as it stands in the present day.

I. INTERNSHIP IN THE PERMANENT MISSION OF PORTUGAL TO THE UNITED NATIONS

a. Overview of the internship

The first part of this internship report consists of a description of the work carried out during a four-month curricular internship in the Permanent Mission of Portugal to the United Nations (UN), in New York, to complete the third semester of the International and European Law Master of the NOVA School of Law. The internship started on 1 September and finished on 31 December 2017, under the general supervision of Deputy Permanent Representative, Cristina Pucarinho⁵.

The decision to complete this internship was related to the wish to have a practical experience in the field of international law and especially see it being applied in practice or at least discussed in its primary context and with its main actors, i.e. the UN and its Member-States. It would allow the consolidation of the knowledge I have acquired within my legal studies, namely by a Law Bachelor's degree and by the completion of the first two semesters of a Master's in international and European Law. The idea of finishing an internship in this international organization was very appealing, as it would additionally allow me to understand how it works, its structure and the existing dynamics between States.

The result was positive, fully meeting my expectations, personally and professionally, while at the same time leading to an understanding that international relations and international law have still a long way to go to achieve their full potential. This is a consequence of the acknowledgment that the UN is an international organization, but above all an organization composed of States that are strongly fighting to have their positions privileged, sometimes at the expense of others. This was specifically showcased in the discussions of the 6th Committee or in the negotiations of the ASP.

⁵ For more details about the Portuguese Mission, see <https://www.onu.missaoportugal.mne.pt/pt/>.

Therefore, when I was initially incorporated in the Mission of Portugal, the preparations for the High-Level Week, that joins in the UN Headquarters the Heads of State and Heads of Government of 193 Member-States⁶, were fully underway, resulting in considerably chaotic weeks of running errands and ensuring everything would be ready in time.

The 72nd session of the General Debate of the United Nations General Assembly (UNGA) had as this year's theme *Focusing on People - Striving for Peace and a Decent Life for All on a Sustainable Planet*⁷ and was held from 19 to 25 of September.

In the case of Portugal, we would be represented by the Prime-Minister, António Costa, and the Minister of Foreign Affairs, Augusto Santos Silva, either in the General Debate or in other events organised under the auspices of the UNGA. I had the special opportunity of watching the statement presented by the Portuguese Prime-Minister on 20 September, which focused on the importance of multilingualism and the Portuguese language, the need to join efforts against climate change and the interconnection of the three pillars of the UN system ("peace, human rights and sustainable development")⁸.

It represented a lifetime opportunity to be present in one of the most important weeks of international relations, where Heads of State and Government made their statements in a time of political, economic and social world-wide instability and uncertainty about the future. Complementarily, it was interesting to understand that often the main political discussions happen not in a transparent and formal way, in debates and meetings, but instead in a bilateral form, that facilitates the exchange of views and common interests.

The end of the General Debate of the UNGA represents the beginning of the work of the six main committees that compose the UNGA: First Committee -

⁶ See the UN Member States at www.un.org/en/member-states/.

⁷ UNGA Res. A/INF/72/4/Rev.1 (15 Sept. 2017) on arrangements for the high-level meetings and the general debate of the seventy-second session of the General Assembly, p. 3, para. 7, available at <https://undocs.org/en/A/INF/72/4/Rev.1>.

⁸ For the entirety of the statement of the Portuguese Prime Minister, see https://gadebate.un.org/sites/default/files/gastatements/72/pt_en.pdf.

Disarmament and International Security; Second Committee - Economic and Financial; Third Committee - Social, Humanitarian and Cultural; Fourth Committee - Special Political and Decolonization; Fifth Committee - Administrative and Budgetary; and Sixth Committee – Legal, according to the allocation of the agenda items for this session⁹. Moreover, in addition to the UNGA, the UN is divided in the following organs: Security Council, Economic and Social Council, the International Court of Justice and the Secretariat¹⁰, that either are operational during all year or in a specific period of time.

According to this division and considering my legal background and interests, I was assigned to work under the main supervision of Paulo Machado, the Legal Adviser of the Portuguese Mission; Raquel Bastos, in charge of Africa-related issues in the Security Council and the Peacebuilding Commission; and João Serrão Lopes, in charge of the 2nd Committee, related with Agenda 2030.

b. Description of the work

During the internship, specifically, I was tasked with following primarily the 6th Committee in charge of Legal Issues, and additionally Security Council issues related with Africa, mainly central and western region, and also the Peacebuilding Commission. Finally, I was tasked with following the 16th session of the Assembly of States Parties of the International Criminal Court, which ultimately provided me with this paper's theme.

Therefore, the main tasks attributed to me included the attendance of formal and informal meetings of the different organs and committees of the UN and the participation in different types of events related with the work being developed. Subsequently, I had to write reports, summaries or briefings, or present them orally to the supervisor in question, in order to inform them of the results of negotiations or the special controversial issues. Especially important was taking into account

⁹ UNGA Res. A/72/252 (15 Sept. 2017) on allocation of agenda items for the seventy-second session of the General Assembly, available at <http://undocs.org/en/A/72/252>.

¹⁰ The Trusteeship Council is no longer active, having been suspended in 1994. For more information, see <http://www.un.org/en/sections/about-un/trusteeship-council/>.

the different States and their different national policies which are reflected in their international relations, and understanding that the many challenges that the UN faces nowadays are a result of budgetary implications.

The presentation of these reports had a deep formative approach, which allowed the exchange of ideas between my supervisors and me, and especially allowed me to ask questions and clear up any doubts. Such moments facilitated the understanding of the issues and to receive some of the expertise of the diplomats, highly valuable given their experience in these contexts. Complementarily, these moments required the development of abilities of conciseness and selection of information, that will be useful for future employment.

Additionally, the Portuguese Mission, as part of Portugal's international diplomatic representation, works in direct contact with the Portuguese Ministry of Foreign Affairs, meaning that often reports would have to be completed and sent to the Ministry, to inform them of the results of negotiations, as well as to receive instructions for future rounds of negotiations, considering the specific Portuguese strategies and policies.

i) 6th Committee

The 6th committee started its work on 2 October and finished on 10 November with the adoption of several resolutions, which were debated throughout the six weeks of work. Under the agenda item "Promotion of Justice and International Law", the 6th Committee debated the following subjects: criminal accountability of UN officials and experts on mission; report of the UN Commission on International Trade Law on the work of its 50th session; UN Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law; report of the International Law Commission (ILC) on the work of its 69th session; expulsion of aliens; report of the Special Committee on the Charter of the UN and on the strengthening of the role of the Organization; the rule of law at the national and international levels; the scope and application of the principle of universal jurisdiction; effects of armed conflicts on

treaties; and responsibility of international organizations. Under the agenda item related with “Drug control, crime prevention and combating international terrorism in all its forms and manifestations”, it debated measures to eliminate international terrorism, and under “Organizational, administrative and other matters”, the discussion focused on the revitalization of the work of the UNGA; programme planning; administration of justice at the UN; report of the Committee on Relations with the Host Country; and several requests for the granting of observer status in the UNGA¹¹.

Of special mention, agenda item 84 related with *Rule of Law at the national and international levels* was especially controversial between some groups of Member-States¹², due to the divergence of rule of law systems throughout the world. The draft resolution at hand recognised the work of the UN in the promotion and consolidation of the rule of law and its support in the domestic implementation of international obligations, through technical assistance and capacity-building¹³. It is important to note that this assistance to be carried out by the UN can only be followed through upon the request of the Member-State in question, which was a highly controversial issue during the consultations of the 6th Committee, with some countries expressing their concerns that the imposition of a specific system to another would be pursued, arguing that *no model fits all*. Therefore, it was interesting to see how Member-States find arguments to shield themselves from showing their true intentions, that were, in this case, not to have the spotlight in their systems and especially its flaws, mostly human rights-related.

Additionally, also in this item, the discussion focused on the willingness of some Member-States, maybe even the majority, to have a debate about Rule of Law and its connection to Agenda 2030¹⁴. This makes special sense when

¹¹ See the allocation of these items in UNGA Res. A/72/252 (15 Sept. 2017) *op. cit.*, pp. 15-16.

¹² On one hand, Russian Federation, Iran, Cuba, Syria, and on the other hand, Australia, the European Union, Switzerland.

¹³ UNGA Res. A/RES/72/119 (18 Dec. 2017), on the rule of law at the national and international levels, available at www.un.org/ga/search/view_doc.asp?symbol=A/RES/72/119, p. 3, para. 16.

¹⁴ UNGA Res. A/RES/70/1 (21 Oct. 2015), on transforming our world: the 2030 Agenda for Sustainable Development, available at <https://undocs.org/A/RES/70/1>.

considering the adoption by the UNGA of the Sustainable Development Goals (SDGs), specifically SDG no. 16 – *peace, justice and strong institutions*, that strives to “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”¹⁵, intrinsically related with the rule of law.

However, and while Agenda 2030 has been adopted in 2015, it still is a target of criticism and continuously questioned by some Member-States (e.g. Russian Federation). That is what happened this year, where some Member-States impeded the inclusion of that discussion in the next year’s programme of work, by questioning the validity of Agenda 2030 and its adoption in 2015. The result was that the sub-topic of the 73rd session of the UNGA related with the Rule of Law will be exactly the same as the one had in the 72nd session, *Rule of Law at the national and international levels*¹⁶.

Other matter worth mentioning is the discussion of agenda item 109 about *Measures to eliminate international terrorism*, where the majority of Member-States that spoke, if not all, expressed their support for the drafting of a *Convention to Combat International Terrorism*, an effort carried out since the creation in 1996 of the Ad Hoc Committee for combating international terrorism¹⁷. From this Committee resulted the adoption of three conventions: *International Convention for the Suppression of Terrorist Bombings*, on 15 December 1997, *International Convention for the Suppression of the Financing of Terrorism*, on 9 December 1999, and *International Convention for the Suppression of Acts of Nuclear Terrorism*, on 13 April 2005¹⁸.

However, the international community has not been able to reach consensus on the definition of terrorism, because of problems of broadness or restrictiveness in the drafting of the definition, and also the problem of distinguishing between

¹⁵ *Idem*, pp. 22-26.

¹⁶ UNGA Res. A/RES/72/119 (18 Dec. 2017), *op. cit.*, para. 28.

¹⁷ Pursuant to UNGA Res A/RES/51/210 (16 Jan. 1997), on measures to eliminate international terrorism, available at <http://legal.un.org/docs/?symbol=A/RES/51/210>, p. 5, para. 9.

¹⁸ For more information, see www.legal.un.org/committees/terrorism/.

the legitimate struggle of populations in the exercise of their right to self-determination from foreign occupation or colonial domination. Furthermore, there was also the recognition of the threat posed by foreign terrorist fighters, i.e. “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or providing or receiving terrorist training, including in connection with armed conflict”¹⁹, which were also the subject of other meetings under the umbrella of the UNSC or the Office of Counter-Terrorism.

Even with these setbacks, 2017 represented an important year for the fight against terrorism, namely with the creation of a specialised agency of the UN, the UN Office of Counter-Terrorism²⁰, chaired by newly appointed Under-Secretary General, Vladimir Voronkov.

Procedurally, the agenda items listed were discussed in the 6th Committee, either in Plenary or in informal consultations, which adopted them within the committee by consensus²¹, then proceeding to the adoption in the UNGA in Plenary. This happened on 7 December 2017, also by consensus, with some States exercising their right of explanation of vote, before and after adoption.

ii) Security Council

The Security Council works with open meetings, that consist of debates between the 15 members that are part thereof and other relevant States (invited to participate if, for example, the discussion concerns them directly), and closed meetings, where only the 15 members are present²². During the internship, I had

¹⁹ UNGA Res. A/RES/72/123 (18 Dec. 2017), on measures to eliminate international terrorism, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/72/123, p. 4, para. 9.

²⁰ UNGA Res. A/RES/71/291 (19 Jun. 2017), on strengthening the capability of the United Nations system to assist Member States in implementing the United Nations Global Counter-Terrorism Strategy, available at www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/291.

²¹ It is the practice of the 6th Committee to adopt its resolutions by consensus, meaning that a special effort during the period of work of the committee has to be made to accommodate the concerns of every delegation.

²² Additionally, the UNSC also organizes "Arria-formula meetings" that tend to be more informal and confidential gatherings of UNSC members or others that are deemed pertinent to the discussion. See more about it at <http://www.un.org/en/sc/about/methods/bgarrformula.shtml>.

the opportunity to attend meetings related with the situation in the Democratic Republic of Congo (DRC), specifically the work of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), and with the creation of the Joint Force in the G5 Sahel countries.

The work of the UNSC regarding DRC, during the internship, related mainly with the Report of the UN Secretary-General (UNSG) on MONUSCO²³ and on MONUSCO Strategic Review²⁴. These reports follow the implementation of a political agreement between the government and the opposition on 31 December 2016, with the aim of holding elections and ensuring the step down of President Joseph Kabila, after completing two terms, according to the DRC's Constitution, and after major manifestations by the population against the maintenance of power by President Kabila²⁵.

This agreement established that new elections should be organized until the end of 2017, but which were already not expected to happen by the UNSC in October, leading to the re-emergence of political tensions and the population's unrest²⁶. The reports and UNSC briefings focused on the necessity of holding free, fair and transparent elections, namely throughout the advanced publication of the electoral calendar and budget²⁷. Adding to these difficulties, the DRC is overburden with an immense flow of refugees from the surrounding countries, like Burundi, and with intense terrorist activities, leading to a dire humanitarian situation and constant violations of human rights²⁸.

After 17 years of the presence of the UN in the country, the MONUSCO Strategic Review establishes a gradual withdrawal of the Mission from the country, meaning budget and resources reductions, that imply the repatriation of a high

²³ UNSC Report of the UNSG S/2017/824 (2 Oct. 2017), on MONUSCO, available at <https://undocs.org/S/2017/824>.

²⁴ UNSC Special Report of the UNSG S/2017/826 (29 Sept. 2017), on the strategic review of MONUSCO, available at <https://undocs.org/S/2017/826>.

²⁵ UNSC Report of the UNSG S/2017/824 (2 Oct. 2017), *op. cit.*, p. 1, para. 2.

²⁶ *Ibidem*.

²⁷ UNSC Special Report of the UNSG S/2017/826 (29 Sept. 2017), *op. cit.*, p. 3, para. 11-13.

²⁸ UNSC Report of the UNSG S/2017/824 (2 Oct. 2017), *op. cit.*, pp. 7-8.

number of troops, ignoring one key element of its mandate, the protection of civilians²⁹. Therefore, there is the additional need to strategically withdraw the troops considering areas where the conflict is more or less intense³⁰ and receive support from the international community and from relevant regional actors, like the African Union (AU) and Economic Community of West African States (ECOWAS)³¹.

Another item on the agenda of the UNSC was the situation in the region of the G5 Sahel countries (composed by Burkina Faso, Chad, Mali, Mauritania and Niger), that are in a deep humanitarian crisis due to terrorism and transnational organized crime. This led to the deployment of the Joint Force of the G5 Sahel, in order to address this constant threat, as well as deal with the flow of refugees and Internally Displaced Persons (IDPs), to facilitate humanitarian operations and to contribute for development activities in the region³². The creation of such force was welcomed by the UNSC in its Resolution 2359 (2017)³³.

Additionally, this Joint Force must complete the work of the UN to tackle the threats, mainly terrorist, to the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), and thus close cooperation and coordination is needed between these two mechanisms, and also with the UN Integrated Strategy for the Sahel (UNISS)³⁴, to avoid duplication of work. Accordingly, the work to be carried out by the Joint Force is two-fold: in a first moment, ensuring border security in strategic sectors, and in a second moment, the launch of operations focused in specific locations, with the aim of neutralizing terrorist and armed groups³⁵. Finally, the importance of fundraising for the management of these

²⁹ *Idem*, p. 11, para. 52.

³⁰ UNSC Special Report of the UNSG S/2017/826 (29 Sept. 2017), *op. cit.*, p. 26, para. 126.

³¹ *Idem*, p. 20, para. 99.

³² UNSC Report of the UNSG S/2017/869 (16 Oct. 2017), on the Joint Force of the Group of Five for the Sahel, available at <http://undocs.org/S/2017/869>, p. 4, para. 12-15.

³³ UNSC Resolution S/RES/2359 (21 Jun. 2017), available at [https://undocs.org/S/RES/2359\(2017\)](https://undocs.org/S/RES/2359(2017)).

³⁴ UNSC Report of the UNSG S/2017/869 (16 Oct. 2017), *op. cit.*, p. 21, para. 84.

³⁵ *Idem*, pp. 5-7.

mechanisms³⁶ was overstated, with the need for an increase in the voluntary contributions made by Member-States but also by the private sector.

iii) Peacebuilding Commission

Identical resolutions 60/180³⁷ and 1645 (2005)³⁸, by the UNGA and the UNSC respectively, created the UN Peacebuilding Commission (PBC), as an intergovernmental advisory body, with the aim of integrating strategies for post-conflict recovery and peacebuilding, institution-building and coordination among the several agencies of the UN and other regional and national actors. Consequently, it established a Peacebuilding Fund (PBF) with the aim of financing the recovery of post-conflict States³⁹, and the PBC has currently the following country-specific configurations: Burundi, Sierra Leone, Guinea, Guinea-Bissau, Liberia and Central African Republic (CAR)⁴⁰.

In this context, I was tasked with following the work of the Peacebuilding Commission in its special configuration for Liberia and the planning of a high-level event to be convened on April 2018 to exchange and develop ideas related with *peacebuilding and sustaining peace*.

Specifically, the country-specific configuration of the UN Peacebuilding Commission for Liberia was established in 2010, with the following purposes: “strengthening the rule of law; supporting security sector reform; and supporting national reconciliation”⁴¹.

During the period of my internship, the focus was on the: (a) political situation, namely the holding of general elections (for President and House of

³⁶ *Idem*, p. 9, para. 34.

³⁷ UNGA Res. A/RES/60/180 (30 Dec. 2005), on the Peacebuilding Commission, available at www.un.org/ga/search/view_doc.asp?symbol=A/RES/60/180.

³⁸ UNSC Res. S/RES/1645 (20 Dec. 2005), available at [www.un.org/ga/search/view_doc.asp?symbol=S/RES/1645\(2005\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1645(2005)).

³⁹ UNGA Report of the UNSG A/60/984 (22 Aug. 2006), on arrangements for establishing the Peacebuilding Fund, available at www.un.org/ga/search/view_doc.asp?symbol=A/60/984.

⁴⁰ For more information, see www.un.org/en/peacebuilding/.

⁴¹ UNGA PBC Statement of mutual commitments on peacebuilding in Liberia PBC/4/LBR/2 (16 Nov. 2010), available at http://www.un.org/ga/search/view_doc.asp?symbol=PBC/4/LBR/2.

Representatives), the first ones to be completely organized by the Government of Liberia since the end of the civil war in 2003; and (b) transition of the presence of the UN in the country after the withdrawal of the UN Observer Mission in Liberia (UNMIL)⁴². The meetings I attended regarding Liberia were comprised of briefings by several experts and officials of UNMIL, the European Union Electoral Observation Mission (EU EOM), ECOWAS, National Electoral Commission (NEC), and others, that gave their account of the developments and the problems that emerged during the elections, mainly to evaluate if they were free, fair and transparent, and what to do to overcome them.

The first round of elections was carried out on 10 October 2017, where two candidates obtained the most votes, George Weah and Joseph Boakai (at the time, Vice-President of Liberia). Although the run-off election was scheduled for 7 November 2017, the results of the first round were challenged by one of the other candidates, with accusations of voter tampering, delaying the run-off. This complaint was, however, dismissed by the Supreme Court of Liberia, leading to the election of George Weah as President on 26 December⁴³.

These elections were needed especially to be held until the end of 2017, since the mandate of UNMIL will end on 30 March 2018, pursuant to UNSC Resolution 2333 (2016)⁴⁴. As a consequence, the establishment of the Transition Multi-Partner Trust Fund to operationalize the UN team that will replace UNMIL is underway, with the aim of mitigating the struggle that Liberia will face after the completion and withdrawal of a 15-year mission⁴⁵.

The feeling, throughout the meetings, was that the peace process that ensued after 2003 was quite successful, Liberia being a test case for other countries and other post-conflict societies. There was still, nevertheless, the idea that this process is continuous and that other measures of reconciliation and rehabilitation of the

⁴² Security Council Report – Liberia (30 Nov. 2017), available at www.securitycouncilreport.org/monthly-forecast/2017-12/liberia_20.php.

⁴³ *Ibidem*.

⁴⁴ UNSC Res. S/RES/2333 (23 December 2016), available at [http://undocs.org/S/RES/2333\(2016\)](http://undocs.org/S/RES/2333(2016)).

⁴⁵ UNSC Res. 1509 (2003), that established the first mandate and deployment of UNMIL, available at [www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1509\(2003\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1509(2003)).

community had to be implemented, such as involving the population and ensuring the dissemination of information, as well as measures to address the root causes of the conflict.

Related with the UNPBC, but more generally under the umbrella of the *Review of the United Nations Peacebuilding Architecture*, I had the opportunity to attend meetings with the aim of convening a High-Level Meeting on 24-25 April 2018 to assess the implementation and the progress achieved by the UN's work on *peacebuilding and sustaining peace*. This, in fact, is a relatively new concept that first emerged in twin resolutions adopted by the UNGA Resolution 70/262 and the UNSC Resolution 2282 (2016), that mandated the President of the UNGA to convene the referred event⁴⁶, and that define it as follows:

“‘sustaining peace’ (...) should be broadly understood as a goal and a process to build a common vision of a society, ensuring that the needs of all segments of the population are taken into account, which encompasses activities aimed at preventing the outbreak, escalation, continuation and recurrence of conflict, addressing root causes, assisting parties to conflict to end hostilities, ensuring national reconciliation, and moving towards recovery, reconstruction and development, and emphasizing that sustaining peace is a shared task and responsibility that needs to be fulfilled by the Government and all other national stakeholders, and should flow through all three pillars of the United Nations engagement at all stages of conflict, and in all its dimensions, and needs sustained international attention and assistance”⁴⁷.

As a key priority of the work of the President of the UNGA, *sustaining peace* redirects the focus to prevention rather than action post-conflict, realizing the need to address the roots causes of conflict to achieve lasting peace⁴⁸. The event

⁴⁶ UNGA Res. A/RES/70/262 (12 May 2016), on the review of the United Nations peacebuilding architecture, available at <https://undocs.org/A/RES/70/262>, p. 7, para. 29; and UNSC Res. 2282 (2016), available at [http://undocs.org/S/RES/2282\(2016\)](http://undocs.org/S/RES/2282(2016)), p. 7, para. 29.

⁴⁷ *Idem*, pp. 1-2.

⁴⁸ Advisory Group of Experts, Report for the 2015 Review of the United Nations Peacebuilding Architecture – *The Challenge of Sustaining Peace* (29 Jun. 2015), available at <http://www.un.org/en/peacebuilding/pdf/150630%20Report%20of%20the%20AGE%20on%20the%202015%20Peacebuilding%20Review%20FINAL.pdf>, p. 11.

of next April has the main goal of raising awareness for the existence of this concept and trying to engage all Member-States and relevant stakeholders, such as regional organizations, non-governmental organizations and civil society⁴⁹, as well as to raise further and predictable funding⁵⁰.

Additionally, the event provides a good platform for the sharing of best practices, especially counting on perspectives from the ground and from the UN-country teams⁵¹. This is particularly useful when we consider Liberia's case, regarded by several as a success case, that can be replicated, although one must always take into consideration the different circumstances of each country. Ultimately, *sustaining peace* relates to a comprehensive approach between the UN, Member-States and relevant actors, as well as within UN's policies and agencies, such as Agenda 2030 and the Sustainable Development Goals, UN-Women, United Nations Children's Fund (UNICEF)⁵².

iv) Assembly of States Parties

The Assembly of States Parties established by the Rome Statute⁵³ was held in New York from 4 December to 14 December 2017. The ASP is convened annually as the management oversight and legislative body of the ICC. Normally, it is held in The Hague, Netherlands, but the 16th session of the ASP involved election of judges, thus the session was convened in New York, guaranteeing a higher level of States' representation.

Additional to the election of judges, the programme of work of the 16th session involved the general debate, a debate on cooperation, a debate on the 20th anniversary of the Rome Statute⁵⁴, the usual consultations about the omnibus⁵⁵

⁴⁹ *Idem*, p. 13.

⁵⁰ *Idem*, pp. 42-46.

⁵¹ *Idem*, p. 9.

⁵² *Idem*, p. 56.

⁵³ Article 112 of the Rome Statute.

⁵⁴ The day of signature of the Rome Statute dates back to 17 July 1998.

⁵⁵ Term referred to as a resolution that englobes generally several aspects of the work of the ICC - ASP Res. ICC-ASP/16/Res.6 (14 Dec. 2017), on strengthening the International Criminal Court and the Assembly of States Parties, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res6-ENG.pdf.

resolution and the budget of the Court, adoption of the war crimes amendments and activation of the jurisdiction of the Court over the crime of aggression⁵⁶.

Worth mentioning in this paper, on a positive note, is the ratification by Panama on 6 December 2017 of the Kampala amendments, both regarding the crime of aggression and article 8 of the Rome Statute. In contrast, South Africa revealed its intention of withdrawing from the Rome Statute, once again, presently deciding to follow the specific national processes, since in the previous year their withdrawal was deemed unconstitutional by two South African lower courts⁵⁷.

Included additionally in the agenda of the ASP was the adoption of war crimes amendments, which were negotiated in the Working Group on Amendments (WGA), aimed at completing the list of war crimes of article 8 of the Rome Statute⁵⁸. This negotiation was mainly driven by Belgium and received a large support by delegations, although consensus had not yet been met.

During the period of the internship, several meetings of the WGA were convened, as well as informal consultations during the ASP, where Belgium tried to gather the support of the majority of States and tried to accommodate the concerns of the rest. The amendments aimed to add four war crimes to the list of article 8, related to the type of weapons used: biological or toxin weapons, antipersonnel mines, weapons injuring by fragments non-detectable by X-rays, and weapons causing permanent blindness⁵⁹.

The main area of disagreement was the inclusion of antipersonnel landmines, because some delegations questioned whether this inclusion would be supported by customary international law⁶⁰. Also questioned was if the constant update of the Rome Statute would damage its universality and contribute to its

⁵⁶ All resolutions adopted, available at https://asp.icc-cpi.int/en_menus/asp/resolutions/Pages/2017-16th-session.aspx

⁵⁷ See more at <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html>.

⁵⁸ It was a negotiation that took place in the 2010 Review Conference as well, but that was unfruitful in the adoption of all the amendments proposed to article 8.

⁵⁹ ASP Report of the WGA ICC-ASP/16/22 (15 Nov. 2017), available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-22-ENG.pdf, annex II.

⁶⁰ *Idem*, p. 3, para. 13.

fragmentation. As such, the WGA reached agreement during the informal consultations held in the ASP on the inclusion of three types of weapons, but it did not do so in including antipersonnel landmines⁶¹.

Thus, the proposal by Belgium was submitted for adoption with the concession to eliminate from the proposal the part about antipersonnel landmines. Before taking action, several delegations made explanations of vote, to voice their concerns with these amendments, but emphasized that they would not oppose consensus⁶². The amendments to update the list of article 8 relating to war crimes was, therefore, adopted by consensus⁶³.

However, the major item of work that occupied most of the time of the 16th session of the ASP was the activation of the jurisdiction of the ICC over the crime of aggression. Throughout the year of 2017, several meetings, also called facilitations⁶⁴, were convened, in order to allow States Parties to discuss their ideas about the crime of aggression with the ultimate goal of an activation decision in the 16th session of the ASP⁶⁵. These facilitations were mandated by the 15th session of the ASP, which should result in a report that would present the different views by States Parties before the 16th session, where an activation was expected⁶⁶.

When I was firstly faced with the issue of the crime of aggression in one of the meetings of this facilitation, it was obvious the difficulty and controversy this issue presented. As a matter of fact, it was immediately understandable that the majority of States Parties advocated for the activation of the jurisdiction of the Court over the crime of aggression, but had fundamental different legal points of

⁶¹ ASP Report of the WGA – Addendum ICC-ASP/16/22/Add.1/Rev.1 (14 Dec. 2017), available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-22-Add1-Rev1-ENG.pdf, p. 1, para. 22 *ter*.

⁶² For example, France, Uruguay, Switzerland.

⁶³ ASP Res. ICC-ASP/16/Res.4 (14 Dec. 2017), on amendments to article 8 of the Rome Statute of the International Criminal Court, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf.

⁶⁴ ASP Res. ICC-ASP/15/Res.5 (24 Nov. 2016), on the strengthening the International Criminal Court and the Assembly of States Parties, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP15/ICC-ASP-15-Res5-ENG.pdf, annex I, para. 18 (b).

⁶⁵ Explained in detail in Part II of this report.

⁶⁶ ASP Report ICC-ASP/16/24 (27 Nov. 2017), on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-24-ENG.pdf.

view about the interpretation resulting from the Rome Statute of 1998 and the Kampala amendments of 2010.

Throughout the facilitation and then in the ASP, heated discussions and negotiations continued about a fundamental issue concerning the exercise of jurisdiction of the Court, that lasted until the last minute, but that ultimately led to the activation of the jurisdiction of the ICC over the crime of aggression on 14 December 2017.

II. THE CRIME OF AGGRESSION UNDER INTERNATIONAL CRIMINAL LAW

a. Background

Efforts to criminalize aggressive warfare trace back to World War I, with the attempt to bring the German Emperor Wilhelm before an international tribunal to try him for the atrocious offenses committed under his command⁶⁷ and through the adoption of the Kellogg-Briand Pact of 1928⁶⁸, acknowledging that some restraint in *jus ad bellum* had to be imposed⁶⁹. However, only in Nuremberg, in 1945, there was an express condemnation of aggressive warfare. In fact, with the end of one of the most heinous moments in history, World War II, the creation of the International Military Tribunal (IMT) for Nuremberg and the Far East represented a true step in the development of international criminal law and ensuring accountability⁷⁰. Specifically, the Charter of the IMT referred to aggression as a crime against peace⁷¹ and Justice Robert Jackson referred to it, in his famous opening statement, as “the supreme international crime”⁷². Thus, the importance of the international legal order was recognized, by ensuring that an individual could be held criminally accountable for international crimes, to the detriment of state sovereignty⁷³.

⁶⁷ SCHABAS, William A. - “Origins of the Criminalization of Aggression: How crimes against Peace Became the ‘Supreme International Crime’”, In POLITI, Mauro and NESI, Giuseppe – *The International Criminal Court and the Crime of Aggression*. England: Ashgate Publishing Limited, 2004. pp. 20-21.

⁶⁸ FERENCZ, Benjamin B. – “Defining Aggression: Where It Stands and Where It’s Going”. *The American Journal of International Law*. Vol. 66, No. 3 (1972), available at <http://www.jstor.org/stable/2198724>, p. 491.

⁶⁹ KOWALSKI, Mateus and TELES, Patrícia Galvão, eds. – *International Criminal Justice: a dialogue between two cultures*. Lisboa: Universidade Autónoma de Lisboa; OBSERVARE, 2017. p. 86.

⁷⁰ Although the IMT for Tokyo did not do so unanimously, with dissenting opinions that invoked the problem of colonial domination. See more about it in SOARES, Miguel de Serpa – “International Criminal Justice and the Erosion of Sovereignty”, In KOWALSKI, Mateus and TELES, Patrícia Galvão (2017), *op. cit.*, p. 38.

⁷¹ Defined in article 6 of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal contained thereto. London, 8 August 1945, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%2082/v82.pdf>. pp. 279-313.

⁷² SCHABAS, William A. (2004), In POLITI, Mauro and NESI, Giuseppe, *op. cit.*, p. 29.

⁷³ SOARES, Miguel de Serpa (2017), *op. cit.*, p. 38.

Also in 1945, the creation of the UN and the drafting of its Charter led to the establishment in article 2, paragraph 4, of the prohibition of use of force⁷⁴, and recognized a system of collective security⁷⁵, giving the power to the UNSC, as the main decision-making organ, to appreciate situations that may constitute a threat to peace, an attack on peace or an act of aggression, under chapter VII⁷⁶. However, nowhere in the Charter is aggression defined and it took 29 years for the UNGA to actually adopt a definition of aggression. This delay in the adoption of a definition was facilitated by the Cold War and the famous problem of the “empty chair” that plagued the UNSC. Even the acknowledgment of the crime of aggression as the supreme international crime, as early as 1945, did not help the international community reach a consensus on its definition, a challenge that lasted until 2010, as will be demonstrated when the Kampala amendments will be analysed.

This interregnum on the absence of an agreement on a definition was not, as one might expect, unfruitful and efforts to agree on one continued, as well as on the advancement of international criminal law. For instance, already at the time, efforts to draft a criminal code accompanied by the establishment of an international criminal court⁷⁷ were underway. For this reason, the UNGA created special committees tasked with defining aggression⁷⁸. Finally, on 14 December 1974, the work of these committees paid off, resulting in the adoption by the UNGA by consensus of Resolution 3314 (XXIX)⁷⁹ with the following definition

⁷⁴ Article 2, paragraph 4, Charter of the United Nations: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.

⁷⁵ SOARES, Miguel de Serpa (2017), *op. cit.*, p. 48.

⁷⁶ Specifically, article 39: “The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.”

⁷⁷ SOARES, Miguel de Serpa (2017), *op. cit.*, p. 41.

⁷⁸ To read more about the efforts undertaken in this in-between period, see LEANZA, Umberto – “The Historical Background”. In POLITI, Mauro and NESI, Giuseppe (2004), *op. cit.*, pp. 5-6.

⁷⁹ UNGA Res. 3314 (XXIX) (14 Dec. 1974), on the Definition of Aggression, available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>.

of aggression and recognizing specifically that a war of aggression is a crime against international peace⁸⁰:

“Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition”.

With the end of the Cold War and the atrocious crimes committed in the Republic of the Former Yugoslavia and in Rwanda, a revitalisation of the discussion over the crime of aggression ensued, i.e. considering individual criminal conduct, and instruments were adopted which provided a definition. One of them is, for instance, the International Law Commission’s (ILC) Draft Code of Crimes against the Peace and Security of Mankind of 1996, but that does not contain a list of acts that may qualify as acts of aggression⁸¹, as the UNGA Resolution, and does not provide directly a definition of aggression. This revitalisation did not mean, however, that real breakthroughs had been accomplished over this particular matter, as will be demonstrated next when considering the adoption of the Rome Statute.

Additionally, it is important to mention that the existence of a definition of aggression, although important for international law and for State responsibility, does not directly enter the scope of this paper. The above-mentioned UNGA Resolution contained a definition of aggression for traditional international law purposes and not as a criminal law concept, which is more related with the subject-matter of this paper.

It proves useful, however, to distinguish acts of aggression from crimes of aggression⁸². In the former, what is being analysed is the conduct of the State,

⁸⁰ *Idem*, article 5.

⁸¹ Article 16 of ILC, 1996, Draft Code of Crimes against the Peace and Security of Mankind, 48th session, Yearbook of ILC, Vol. II, available at http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/7_4_1996.pdf&lang=EF.

⁸² See WILMSHURST, Elizabeth – “Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility”, p. 93-96; and GOMAA, Mohammed M. – “The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime”, p. 64-66. In POLITI, Mauro and NESI, Giuseppe (2004), *op. cit.*.

whilst in the latter what is in question is the individual criminal conduct that arises from an act of aggression. This is to say that, in the present-day, acts of aggression give rise to State responsibility and its determination belongs to the UNSC, as well as, in principle, fall under the jurisdiction of the International Court of Justice (ICJ)⁸³; on the contrary, crimes of aggression belong within the jurisdiction of the ICC, which is not dependent of a prior determination by the ICJ or the UNSC⁸⁴, although the road to get to this regime was not without its challenges.

b. Rome Statute

The Rome Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, representing a big step in the development of international criminal justice and ensuring accountability for those responsible for the most serious crimes. The ICC would be established after the entry into force of the Rome Statute, that required the ratification of 60 States. This number was reached on 1 July 2002 and the Rome Statute has, at the date of the writing of this paper, 123 States Parties⁸⁵.

First and foremost, the ICC recognized two modern ideas, the exercise of criminal jurisdiction, that is not only confined in the State and, consequently, the role of the individual as a subject of international law⁸⁶. The document emerging from Rome established, therefore, four core crimes attributable to individuals within the jurisdiction of the Court, chosen because they are considered “the most serious crimes of concern to the international community as a whole”⁸⁷: crime of genocide, crimes against humanity, war crimes and crime of aggression. Therefore,

⁸³ In the famous case of *Nicaragua v. United States*, the ICJ considered that the definition contained in Resolution 3314 was in line with customary international law, although it still has not made a specific finding of an act of aggression. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, para. 195.

⁸⁴ This will be developed further when considering the role of the UNSC in the determination of a crime of aggression – Part II – Section c) – lit. ii).

⁸⁵ Status of ratification available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en.

⁸⁶ KOWALSKI, Mateus – “The International Criminal Court. Reflections for a stress test on its foundations”. *JANUS.NET e-journal of International Relations*. Vol. 2, No. 2 (2011). p. 112.

⁸⁷ Preamble of the Rome Statute.

it is important to keep in mind some aspects of the Rome Statute, mainly regarding the exercise of jurisdiction by the Court, which will be helpful in understanding the core part of this paper.

Firstly, the ICC Prosecutor may initiate an investigation by: a referral of a situation by a State Party⁸⁸, a *proprio motu* investigation⁸⁹ and a referral by the UNSC⁹⁰. In the case of referral by the UNSC, the jurisdiction of the Court is potentially unlimited, since the UNSC can refer any State, even if it is not a Party to the ICC Statute; although, this organ retains the power to delay any investigation or prosecution of the ICC for a renewable period of 12 months⁹¹, which conditions greatly the possibility of intervention by the Court⁹².

Secondly, regarding genocide, crimes against humanity and war crimes, the ICC may exercise jurisdiction if⁹³: the accused is a national of a State Party or a State that has accepted the jurisdiction of the Court; the alleged crime has taken place on the territory of a State Party or a non-State Party which has made an *ad hoc* declaration accepting the jurisdiction of the Court; or if the UNSC has referred the situation to the Prosecutor, irrespective of the nationality of the accused or whether the State is a party to the Rome Statute⁹⁴. This means that the ICC has a “hypothetical universal jurisdiction reach”⁹⁵, since its jurisdiction is conditional both upon nationality and territory.

Contrary to this, the crime of aggression was not at all consensual, in its major aspects, including once again in its definition and the exercise of jurisdiction

⁸⁸ Article 14 of the Rome Statute.

⁸⁹ Article 15 of the Rome Statute.

⁹⁰ Under chapter VII of the Charter of the UN.

⁹¹ Article 16 of the Rome Statute.

⁹² See, for example, the case of peacekeeping operations by the UN – UNSC Res. 1422 (2002), available at [www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1422\(2002\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1422(2002)), in which the UNSC used the prerogative given in article 16.

⁹³ Article 12 of the Rome Statute.

⁹⁴ COALITION FOR THE INTERNATIONAL CRIMINAL COURT – “Factsheet: the crime of aggression within the Rome Statute of the International Criminal Court” (11 Oct. 2017), available at http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/ciccfactsheet_crimeofaggression_oct_2017.pdf.

⁹⁵ ERIKSSON, Christian – “ICC Jurisdiction Over Nationals of Non-Party States: An ultra vires abomination, or legitimate judicial conduct?”, *Örebro Universitet, Juridicum* (2017). p. 17.

by the Court. In truth, the debate on the definition that characterised the 50 years until the adoption of the Rome Statute, was replicated during the conference to establish an international criminal court, where some delegations defended including elements of the definition contained in Resolution 3314, while others argued that the definition therein did not deal with the specific issue of individual criminal accountability⁹⁶. For instance, to the ILC, attaching “individual criminal responsibility to acts of aggression involved a substantive amount of progressive development of international law”⁹⁷, that was contrary to the aim of the Rome Statute, which was to codify existing customary international law⁹⁸.

Those against the inclusion of this crime in the draft of the Rome Statute feared the overpoliticization of the Court, mainly because States could abuse this power by constantly referring cases to the Court, even if they did not really surmount to a crime of aggression and would not go against the Charter of the UN⁹⁹. As such, it might lead to the use of (prejudicial) propaganda by States against other States¹⁰⁰. Another argument was that the definition of the crime of aggression was not generally accepted and there was no existing precedent of aggression, therefore preventing individual criminal responsibility¹⁰¹ from arising. One could argue, however, that the precedent of aggression is actually constituted in the Nuremberg trials, as part of its legacy, by recognizing it as the supreme international crime.

Moreover, it was argued that the crime of aggression was not satisfactorily defined by Resolution 3314 and, complementarily, in international law, since it was too vague and broad, not allowing individuals to know exactly which conducts

⁹⁶ UNGA, Report of the Preparatory Committee on the Establishment of an International Criminal Court A/51/22 (13 Sept. 1996), available at <https://www.legal-tools.org/doc/e75432/pdf/>. p. 19, para 72.

⁹⁷ UNGA, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court A/50/22 (6 Sept. 1995), available at <https://www.legal-tools.org/doc/b50da8/pdf/>. pp. 13-14, para. 64.

⁹⁸ Article 10 of the Rome Statute states that this statute is not to be taken as limiting or prejudicing the development of international law. In SCHABAS, William A. – *An Introduction to the International Criminal Court*. 2nd Edition. United Kingdom: Cambridge University Press, 2004, p. 28.

⁹⁹ POLITI, Mauro – “The Debate within the Preparatory Commission for the International Criminal Court”. In POLITI, Mauro and NESI, Giuseppe (2004), *op. cit.*, p. 45.

¹⁰⁰ *Ibidem*.

¹⁰¹ UNGA, Report of the Preparatory Committee (13 Sept. 1996), *op. cit.*, pp. 18-19, para. 68.

are prohibited¹⁰² (pursuant to the principle of legality). This latter argument is, however, simply beyond the point: the Rome Conference and the States present had the prerogative of defining the crime and maybe limit its scope. The true problem laid with the inability of reaching consensus, because some countries had more to lose with the criminalisation of aggression than others.

There were also questions of how to guarantee conformity of the criminalisation of aggression in such a statute with cases of humanitarian intervention¹⁰³, that do not have an express legal basis in the UN Charter. The concern was that when these humanitarian interventions were used in cases of dire need and as the only remaining mean possible to end the perpetration of other crimes, lacking the consent of the UNSC, that these actions could surmount to an act and crime of aggression that would be punishable under the Rome Statute¹⁰⁴. Moreover, there were some concerns on how to ensure that the procedures and practices of the international community relating with *jus in bello* crimes (law governing the conduct of hostilities) and *jus ad bellum* crimes (law of recourse to force)¹⁰⁵, would conform with the procedures that would be created for the ICC¹⁰⁶.

Finally, some delegations claimed that the inclusion of the crime of aggression in the jurisdiction of the ICC would hinder its universality, because several States may choose to turn away from the Court, if that guarantees no prosecution for acts of aggression¹⁰⁷. But then again, one has to ask which of the main purposes of the ICC should be valued to the detriment of the other: universality of the Rome Statute or accountability for the most serious of international crimes? Of course, one must also keep in mind that the crime of aggression, resulting from an act of aggression, is a crime that by its very nature

¹⁰² WEED, Matthew C. – “International Criminal Court and the Rome Statute: 2010 Review Conference”. Congressional Research Service (2011). p. 6.

¹⁰³ UNGA, Report of the Ad Hoc Committee (6 Sept. 1995), *op. cit.*, pp-13-14, para. 64.

¹⁰⁴ ESBROOK, Leslie – “Exempting Humanitarian Intervention from the ICC's Definition of the Crime of Aggression: Ten Procedural Options for 2017”. *Virginia Journal of International Law*. Vol. 55, No. 3 (2015).

¹⁰⁵ See more about *jus in bello* and *jus ad bellum* and the fading of these concepts in STAHN, Carsten – “‘Jus ad bellum’, ‘jus in bello’ . . . ‘jus post bellum’? – Rethinking the Conception of the Law of Armed Force”. *The European Journal of International Law*. Vol. 17, No. 5 (2006).

¹⁰⁶ WEED, Matthew C. (2011), *op. cit.*, p. 4.

¹⁰⁷ *Idem*, pp. 4-5.

encompasses other crimes, such as killings, torture, sexual violence; crimes that in principle are still subject to the jurisdiction of the Court under the other three core crimes regimes. This leads to the conclusion that accountability is still guaranteed, although the special gravity of the perpetration of a crime of aggression is not. As the IMT prescribed in the Nuremberg Judgment, aggression “(...) is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”¹⁰⁸.

Responding to these critics, delegations in favour of including the crime of aggression as a core crime of international criminal law argued that it would create a deterrent effect, fighting impunity and guaranteeing accountability, through the possibility of prosecution of individuals responsible for the most serious crimes¹⁰⁹. Furthermore, the criminalisation of aggression was already provisioned in the IMT’s Charter, as explained above, although under a different name, and already consolidated as international customary law, resulting in the fact that the exclusion of the crime of aggression from the Statute would actually represent a regression in the development of international law¹¹⁰.

This exchange of pros and cons of including the crime of aggression was not going to end in an agreement between the Parties, but indeed what was necessary was a compromise. That was exactly what happened when States agreed to include article 121, paragraphs 4 and 5¹¹¹, that deal with amendments to the Statute; the first requires the ratification or acceptance of the amendments by seven-eighths of all States Parties for the entry into force to be applied to all the States Parties; the latter provides the entry into force of the amendment for those States Parties that have ratified or accepted them, when in question an amendment to article 5, 6, 7 and 8, whereas a State Party that has not accepted the amendment

¹⁰⁸ IMT, Judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22* (22 August 1946 to 1 October, 1946), available at https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf, p. 25.

¹⁰⁹ UNGA, Report of the Preparatory Committee (13 Sept. 1996), *op. cit.*, p. 18, para. 66.

¹¹⁰ *Ibidem*.

¹¹¹ FERENCZ, Benjamin B. – “Ending Impunity for the Crime of Aggression”. *Case Western Reserve Journal of International Law*. Vol. 41, No. 2 (2009), p. 287.

is not included in the exercise of jurisdiction by the Court. Regarding this provision, some authors question if it is still in effect and if there was the intention of delegations to actually revoke it, by establishing a new regime. More on this later¹¹², since it is part of the central discussion held in the 16th session of the ASP about what interpretation to give to the Kampala amendments.

The inclusion of these provisions unblocked the discussion on the crime of aggression and, as such, it is listed in article 5, paragraph 1, as one of the core crimes prosecutable by the ICC. However, it was not enough to agree on a definition and, hence, the Rome Statute was adopted without one¹¹³. Indeed, establishing a delay in the definition and jurisdictional regime of the Court over the crime of aggression, **article 5, paragraph 2**, read as follows:

“2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

This paragraph truly represented a compromise between the States that wanted to guarantee more protection for its nationals and in its territory for acts of aggression committed against them and the (powerful) States, that did not want to abdicate part of their sovereignty to an international judicial organ and risk being prosecuted for the perpetration of an act of aggression¹¹⁴.

This means that, while the jurisdiction of the Court regarding the other three core crimes would start as soon as the Rome Statute entered into force, the jurisdiction of the Court over the crime of aggression would only be possible at a later stage, when amendments to the Statute would be enforced. In fact, only seven years after the entry into force of the Statute, would States Parties be allowed to propose amendments, to be analysed either in the ASP or in a Review Conference,

¹¹² See Part II – Section c) – lit. ii).

¹¹³ It is reported that the effort for the inclusion of the crime of aggression in the ICC Statute was mainly due to the Non-Aligned Countries, in SCHABAS, William A. (2004), *op. cit.*, p. 31.

¹¹⁴ FERENCZ, Benjamin B. (2009), *op. cit.*, p. 284.

according to articles 121 and 123. Moreover, this provision also established that the amendments will have to conform with the UN Charter, primarily the parts that relate to the use of force and its prohibition therein, and the functions of the UNSC.

The discussion was not in stand-by, however, while States Parties waited the expiry of these seven years. In fact, in the first ASP after the establishment of the International Criminal Court, in 2002, States decided to create the Special Working Group on the Crime of Aggression (SWGCA)¹¹⁵, with the main task of agreeing on a definition, in particular the individual conduct and the State conduct, and settling the problems about the jurisdiction of the Court. In addition, the Princeton process, led by Liechtenstein, which was the main promotor of the criminalisation of aggression both in Kampala and in the ASP, was also another opportunity for States to expose their views and reach some conclusions by way of informal meetings, vital for the reaching of consensus in Kampala¹¹⁶.

c. Kampala amendments

Both these processes were essential in the leading up to the Review Conference, to keep States interested and participating, facilitating the negotiations in Kampala, in the sense that the States were completely aware of the legal and political challenges it represented¹¹⁷. Effectively, the Review Conference, from 31 May to 10 June 2010, held in Kampala, Uganda, was convened with the main purpose of finally settling the issue of the crime of aggression, although other amendments were also adopted, namely to article 8 on war crimes¹¹⁸.

¹¹⁵ ASP Res. ICC-ASP/1/Res.1 (9 Sept. 2002), available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-01-ENG.pdf.

¹¹⁶ KREß, Claus and HOLTZENDORFF, Leonie von – “The Kampala Compromise on the Crime of Aggression”. *Journal of International Criminal Justice*. Vol. 8, No. 5 (2010). pp. 1186-1187. Also BARRIGA, Stefan and GROVER, Leena – “A Historic Breakthrough on the Crime of Aggression”. *The American Journal of International Law*. Vol. 105, No. 3 (2011), pp. 518-519.

¹¹⁷ SOARES, Miguel de Serpa (2017), *op. cit.*, p. 49. Still many delegations were not present in the Review Conference, in HELLER, Kevin Jon – “The Uncertain Legal Status of the Aggression Understandings”. *Journal of International Criminal Justice*. Vol. 9 (2011), p. 9.

¹¹⁸ RC Res. RC/Res.5 (10 Jun. 2010), available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf.

Concerning the crime of aggression, the Review Conference had the task of deciding the following issues: 1) definition; 2) exercise of jurisdiction, including the role of the UNSC and jurisdictional regime relating with non-State Parties and non-ratifying States Parties¹¹⁹. Unlike the previous negotiating history of the crime of aggression, which focused on the definition, the controversial issue that would characterise the Review Conference would be the exercise of jurisdiction of the Court, including the role of the UNSC or the question of State consent regarding nationals of the States that would not ratify the amendments¹²⁰. It was a debate in fact replicated in the 16th session of the ASP, as will be demonstrated, and that contributed deeply for the existing divergent opinions.

Additionally, along with the adoption of the amendments themselves on the crime of aggression, States Parties included, annexed to the Kampala Resolution¹²¹, a list of *Understandings* that aimed at helping the Court interpret the several provisions adopted.

However, the legal effect of these *Understandings* is questioned by several authors¹²², for instance, HELLER who explores the possibility of them being: amendments to the Rome Statute; a primary means of interpretation of the amendments, under article 31 of the Vienna Convention of the Law of Treaties (VCLT); an agreement to modify the Statute, under article 41 of the VCLT; or a secondary means of interpretation of the amendments, under article 32 of the VCLT. The author reaches the conclusion that the only plausible option is the latter, by seeing the *Understandings* as a secondary means of interpretation of the Kampala amendments. His reasoning is based on the exclusion of the former options since the requisites for each of them are not fulfilled, for example the fact

¹¹⁹ As well as agreeing on Elements of Crime, which the Review Conference did, but that will not be object of analysis on this paper.

¹²⁰ BARRIGA, Stefan and GROVER, Leena (2011), *op. cit.*, p. 520.

¹²¹ RC Res. RC/Res. 6* (11 Jun. 2010), on the crime of aggression, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

¹²² Such as KREß, Claus and HOLTZENDORFF, Leonie von (2010), *op. cit.*.

that such an agreement was not concluded by all the States Parties or that it cannot be considered as context to the Rome Statute¹²³.

Briefly, the *Understandings* touch on four different issues: referrals by the UNSC, jurisdiction *ratione temporis*, domestic jurisdiction over the crime of aggression, and related with the scope of the definition of a crime of aggression¹²⁴.

Regarding jurisdiction *ratione temporis*, *Understanding* no. 3 states that the Court may only exercise jurisdiction after a decision on the activation of the jurisdiction of the Court is taken or one year after the ratification of the amendments by 30 States Parties, whichever is later. In other words, the temporal jurisdiction of the Court over the crime of aggression can only be exercised after the entry into force of the amendments.

Understandings no. 4 and 5 deal with the issue of domestic jurisdiction over the crime of aggression, which is closely connected with the principle of complementarity, according to articles 1 and 17 of the Rome Statute¹²⁵. It basically establishes that the amendments do not create a right or an obligation for one State to prosecute domestically the perpetration of an act of aggression by another State. JURDI questions whether the limitations imposed on the exercise of jurisdiction by the Court over the crime of aggression, as set out by the Kampala Resolution, as will be demonstrated, will apply *mutatis mutandis* to the exercise of domestic jurisdiction¹²⁶. She concludes that the principle of complementarity remains in

¹²³ Read his reasoning in more detail in HELLER, Kevin Jon (2011), *op. cit.*. In contrast, Dörr suggests the understandings as examples of an agreement that would fall under article 31, paragraph 2, lit (a). In DÖRR, Oliver and SCHMALENBACH, Kirsten, eds. – *Vienna Convention on the Law of Treaties – A commentary*. Berlin, Heidelberg: Springer-Verlag, 2012, p. 549.

¹²⁴ Some of these *Understandings* will be analysed later, when relevant to the discussion herein.

¹²⁵ Initially, it was recognized that national courts should refrain from deciding cases related with acts of aggression committed by other States, because of the principle *par in parem imperium non habet* (an equal has no authority over an equal). This author suggests that national courts have the responsibility to prosecute crimes of aggression committed by nationals of the countries of these courts and also prosecute non-nationals that commit a crime of aggression, after the ICC or the UNSC determines that an act of aggression has been perpetrated. In JURDI, Nidal Nabil – “The Domestic Prosecution of the Crime of Aggression after the International Criminal Court Review Conference: Possibilities and Alternatives”. *Melbourne Journal of International Law*. Vol. 14, No. 2 (2013), p. 131.

¹²⁶ Limitations that will be explored in the section relating with the exercise of jurisdiction - see Part II - section c) - lit. ii).

complete effect regarding all core crimes, suggesting the same reasoning regarding the *Understandings* as a secondary means of interpretation^{127/128}.

In what concerns the remaining *Understandings*, they will be dealt with next, since they relate with the definition of the crime of aggression and with the role of the UNSC in the exercise of jurisdiction of the ICC.

i) Definition adopted

The work of the two processes (SWGCA and Princeton Process) that were in effect between the adoption of the Rome Statute and the possibility of adopting amendments was quite essential for the reaching of consensus in Kampala¹²⁹. Although some breakthroughs were reached in this interim, the Review Conference negotiations about the definition itself continued to revolve around the confirmation of the provision contained in Resolution 3314, the definition provided by the ILC or even creating a new one. Correspondingly, States Parties also debated over including a list of acts that might qualify as acts of aggression and, if yes, if the list would be exhaustive or not¹³⁰. Basically, the negotiations focused on two positions: the hope of some delegations to criminalise each and every unlawful use of force and the argument of the rest of States that a definition of that type would be too broad, providing uncertainty on which conducts would be punishable by the ICC.

The discussions in Kampala met consensus in the fact that the crime of aggression is a leadership crime¹³¹, restricted to acts committed or planned by State officials, that hold positions of political or military control of a State. The intent of this recognition was restricting the jurisdiction of the Court to the worst crimes, especially heinous because they included not only the act of aggression, but also

¹²⁷ Idem, p. 147. This author explains in more detail her reasoning for suggesting that the principle of complementary applies fully to aggression, based on a progressive reading of the Kampala amendments.

¹²⁸ For the purposes of this paper, the matter of domestic jurisdiction over the crime of aggression will not be fully explored here, as it does not relate directly with the scope of the activation of jurisdiction.

¹²⁹ See in detail KREß, Claus and HOLTZENDORFF, Leonie von (2010), *op. cit.*, 1183-1201.

¹³⁰ SCHABAS, William A. (2004), *op. cit.*, p. 33.

¹³¹ SCHARF, Michael P. – “Universal Jurisdiction and the Crime of Aggression”. *Harvard International Law Journal*. Vol. 53, No. 2 (2012), p. 363.

other crimes, simultaneously ensuring accountability for the highest-ranking people, and unloading the Court with cases that did not have the same gravity. This definition has been, however, a target of some critics, because it did not include the acts of aggression committed by non-state actors, especially relevant considering the terrorist attacks, such as 9/11¹³².

Thus, negotiations about the definition resulted in article 8 *bis* of the Kampala amendments, stating that it consists, when considering the individual conduct, of “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”

Complementarily, when considering the State conduct, it defines an act of aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”. It then proceeds to list acts that shall qualify as acts of aggression, according to Resolution 3314, not mentioning expressly that they are not exhaustive. Although considering that article 8 *bis* refers to this resolution expressly, one could argue that this list is therefore not exhaustive, since that is prescribed in article 4 of Resolution 3314¹³³. However, such provision also leaves the determination of acts not contained in this list to the UNSC, that remains problematic, as will be demonstrated, when considering the role of the UNSC.

The main consideration to be made about the definition adopted is the fact that it includes a threshold requirement: it must constitute a manifest violation of the Charter of the UN by determining the sufficiency of the three components of character, gravity and scale, according to *Understanding* no. 7. This is a result of

¹³² SANTOS, Sofia – “The International Criminal Court and the construction of International Public Order”. In KOWALSKI, Mateus and TELES, Patrícia Galvão (2017), *op. cit.*, p. 154.

¹³³ Article 4 of Resolution 3314 (XXIX): “The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.”

the insistence of delegations advocating that the Rome Statute must not create new law, but codify customary international law, as well as the attempt not to overburden the Court with some actions that may not be the most serious violations of international criminal law¹³⁴.

Another reason to include this threshold was that there would be the automatic exclusion of humanitarian interventions as described before¹³⁵, since these, by their very nature, fall out of the concept of a manifest violation of the Charter¹³⁶. WEED is of the opinion, however, that this definition is too broad, risking englobing also situations of responsibility to protect or self-defence under article 51 of the UN Charter¹³⁷, that should be exempted from the Court's jurisdiction.

In fact, unlike Resolution 3314, which in the preambular part established the need for a determination of an act of aggression to be considered in light of all the circumstances of each particular case, the Kampala amendments do not establish the specific case-by-case analysis themselves. However, *Understanding* no. 6 of Annex III states that this determination “requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations”.

The considerations above result in the conclusion that, and according to AKANDE, the violation of the prohibition of the use of force must be a grave violation of the UN Charter with serious consequences¹³⁸, excluding situations with a shorter duration or commanded by lower ranking officers, or that are justified by humanitarian reasoning or self-defence.

¹³⁴ BARRIGA, Stefan and GROVER, Leena (2011), *op. cit.*, p. 519.

¹³⁵ *Idem*, p. 522.

¹³⁶ Kevin Jon Heller describes it as an insistence by the USA for the ICC not to consider cases of humanitarian intervention, without authorization by the UNSC. In HELLER, Kevin Jon (2011), *op. cit.*, p. 4. For more about humanitarian interventions, see ESBROOK, Leslie (2015), *op. cit.*

¹³⁷ See more critics to the definition in WEED, Matthew C. (2011), *op. cit.*, p. 7.

¹³⁸ AKANDE, Dapo – “What Exactly was Agreed in Kampala on the Crime of Aggression?” *EJIL: Talk!* (21 Jun. 2010), available at <https://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>.

ii) Exercise of jurisdiction

By agreeing relatively easily on a definition, that meant that delegations would spend most of their time discussing the main controversial issues that characterised Kampala in 2010, and then New York in 2017, regarding the exercise of jurisdiction by the ICC over the crime of aggression. Firstly, considerations will be made on the role of the UNSC in the determination of an act of aggression and afterwards on the limitations of the exercise of jurisdiction by the Court as set out by the Kampala Resolution, that created a divergence of opinion between States Parties and that led to the creation of two camps of interpretation: camp-consent and camp-protection.

To introduce the jurisdictional specificities of the Kampala amendments, one must keep in mind that delegations agreed in delaying once more the beginning of the exercise of jurisdiction by the Court. In fact, new articles 15 *bis* and 15 *ter*, in their identical paragraphs 2 and 3, provide that the ICC can only exercise its jurisdiction over the crime of aggression: (a) one year after the ratification or acceptance of the amendments by 30 States Parties, (b) after 1 January 2017, and (c) after a decision has been taken by the ASP, by two-thirds majority of States Parties (if consensus is not achieved), whichever is later. The first two conditions were met in the year of 2017¹³⁹ and so the opportunity to activate the Court's jurisdiction over the crime of aggression arrived and all that was needed was a decision by the ASP, which will be featured in Part III of this paper.

These conditions represented a compromise that facilitated the adoption of the following amendments, which themselves represent compromises on the jurisdictional aspects of the crime of aggression. As such, the imposition of these extra conditions for the activation of the exercise of jurisdiction by the Court is a true reflexion of the unwillingness and unpreparedness of the international community to have the crime of aggression fully functional and prosecutable under international criminal justice, that lasted since Nuremberg until (hopefully) 17 July

¹³⁹ As of 10 March 2018, 35 States Parties have ratified the crime of aggression amendments. Status of ratification available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-10-b&chapter=18&lang=en.

2018, as will be demonstrated, when explaining the solution which resulted from the 16th session of the ASP.

In contrast, POLITI is of the opinion that this delay could actually be positive for the Court, because it would allow the ICC to prepare for the inclusion of the crime of aggression in its workload, adapting its organizational and administrative structure, especially considering the added function given to the Pre-Trial Chamber¹⁴⁰. Additionally, it would allow for some questions regarding the interpretation of the Kampala amendments to be solved, especially considering non-States Parties and States Parties that do not ratify¹⁴¹. Of course, presently, one knows that this interim period did not really help solving the conundrums that came out of Kampala, considering that only in 2017 were these questions answered (although, one might still argue that they continue unanswered).

a. The role of the UNSC

Thus, adding to the disagreement about the definition of the crime of aggression, there was no consensus regarding the role of the UNSC in the determination of an act of aggression prior to the exercise of jurisdiction by the Court, a discussion already had at the time of adoption of the UN Charter¹⁴². The major powers, i.e mainly the UNSC Permanent Members, argued vehemently that the jurisdiction of the Court over the crime of aggression would have to be preceded necessarily by a finding of the UNSC of an act of aggression committed by a State. By accepting this understanding, the Permanent Five (P5) would always maintain the power concentrated in the UNSC, considering their possibility of veto, and the Court would be dependent on their determination to be able to exercise its jurisdiction¹⁴³.

¹⁴⁰ Explained in the next section.

¹⁴¹ POLITI, Mauro – “Artigos 8 bis, 15 bis e 15 ter: crime de agressão”. In STEINER, Sylvia Helena and BRANT, Leonardo Nemer Caldeira – *O Tribunal Penal Internacional: comentários ao Estatuto de Roma*. Belo Horizonte: Konrad Adenauer Stiftung, CEDIN, Del Rey, 2016. pp. 238-239.

¹⁴² LEANZA, Umberto – “The Historical Background”. In POLITI, Mauro and NESI, Giuseppe (2004), *op. cit.*, pp. 12-15.

¹⁴³ Report of the Preparatory Committee (1996), *op. cit.*, para. 73.

This conviction was supported by the ILC as well, that argued that since the Court has no enforcement powers, it is forced to rely on the cooperation of national authorities or of the UNSC to conduct investigations or make arrests¹⁴⁴. This conviction was even represented in the ILC's draft Statute on an international criminal court of 1994¹⁴⁵, by requiring a determination of the UNSC that an act of aggression was committed, before the possibility of such case being brought to the international criminal court that would be established¹⁴⁶. This dependence on the UNSC would mean that the Permanent Members would have to vote in favour of the enforcement measures, or the Court would become blocked.

When the Rome Statute was adopted, those who argued for the need to have a UNSC decision on an act of aggression for the Court to intervene, invoked article 5, paragraph 2, of this Statute, to justify their argument, because it provided for the need of consistency with the relevant provisions of the Charter of the UN, this is to say chapter VII regarding the role of the UNSC.

However, such dependence on the UNSC would represent a strong limitation to the intervention of the Court, since it would require a previous decision of an over-politicized organ, that is even more so when in question are acts committed against the sovereignty of States and that are politically-charged matters. It would pave the way for the frequent use of veto by the P5 countries and on top of that it would value the will of a political body to the detriment of the independence of a judicial organ. Complementarily, the asymmetry between the different countries would be tremendous¹⁴⁷, since P5 States and "friends" could always go unpunished, while the remaining would be subject to the control of the UNSC, thus continuing a culture of impunity for some and not others.

This being said, one cannot ignore, nevertheless, that the existence of criminal responsibility attributed to an individual for a crime of aggression is

¹⁴⁴ FERENCZ, Benjamin B. (2009), *op. cit.*, p. 286.

¹⁴⁵ ILC, Draft Statute for an International Criminal Court, 1994, 46th session, Yearbook of the ILC, Vol. II (Part Two), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1994.pdf.

¹⁴⁶ *Idem*. Article 23, paragraph 2.

¹⁴⁷ HELLER, Kevin Jon – "The Sadly Neutered Crime of Aggression". *Opinio Juris* (13 Jun. 2010), available at www.opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/.

dependent on the existence of an act of aggression by the State. The same is suggested, for example, by WILMSHURST when saying: “the crime of aggression cannot be committed by an individual unless a State is internationally responsible for an act of aggression, however that responsibility is recognized: no state responsibility for an act of aggression, no crime of aggression by an individual”¹⁴⁸. However, this is not the same as saying that the exercise of jurisdiction by the ICC would be dependent on a previous determination by the UNSC. In fact, delegations in the negotiations insisted that the decision on the existence of a crime of aggression by the ICC, and implicitly an act of aggression, depends on the circumstances of each case, giving the Court some discretion in this particular matter¹⁴⁹, as demonstrated. That is why the definition adopted contains a list of acts that may qualify as acts of aggression and also why it is not exhaustive.

Furthermore, nowadays, the determination of an act of aggression for purposes of State responsibility belongs to the UNSC or the ICJ (according to its admissibility conditions), but it does not impede the ICC from exercising its jurisdiction over individuals (in a position of power or control) that commit a crime of aggression. The question that the States had to answer was how to solve the inconsistencies that may arise from contradictory decisions taken by the UNSC and by the ICC, such as what would happen if the UNSC did not make a determination of an act of aggression and the Court would later on decide that there was an act of aggression or, on the contrary, if the UNSC determined the existence of an act of aggression and then if the Court could decide to acquit the individual¹⁵⁰. The possibility of inconsistencies arises as well from the fact that the ICJ can decide on the existence of an act of aggression. Therefore, it was important to ensure that the powers and functions of the different organs were duly divided and clarified, thus avoiding conflicting decisions.

¹⁴⁸ WILMSHURST, Elizabeth (2004), *op. cit.*, pp. 93-96.

¹⁴⁹ POLITI, Mauro and NESI, Giuseppe (2004), *op. cit.*, pp. 48-50.

¹⁵⁰ UNGA, Report of the Ad Hoc Committee (1995), *op. cit.*, para. 70.

A discussion already had in the negotiations for the establishment of the ICC¹⁵¹ led to the recognition by delegations in the Review Conference of the necessity of striking a balance between the requirement of the independence of the Court and also the need to respect the role played by the UNSC for the maintenance of international peace and security. These concerns are reflected in the compromise reached by the delegations present at Kampala under articles 15 *bis* and 15 *ter* of the Kampala Resolution.

As such, the role of the UNSC in the determination of an act of aggression is briefly the following: upon receiving a State referral or initiating an investigation that a crime of aggression has been committed, the Prosecutor must determine if there is reasonable basis to continue the investigation, also if the UNSC has already made a determination itself about the existence of an act of aggression and must additionally notify the UNSG¹⁵². If the UNSC has already made such determination, then the Prosecutor may continue with the investigation¹⁵³. If not, the Prosecutor must wait for six months for that determination and if it is not done, he or she may continue with the investigation upon receiving the authorization of the Pre-Trial Chamber¹⁵⁴. This would mean an added filter to the exercise of jurisdiction by the Court against politically motivated and meritless cases¹⁵⁵.

Complementarily, paragraph 9 of article 15 *bis* and paragraph 4 of article 15 *ter* establish that the determination of the existence of an act of aggression by an organ outside of the Court shall not affect the Court's own findings over such an act. This allows the Court to act independently, without needing to wait for a prior decision by the UNSC about the existence of an act of aggression, broadening the area of activity of the Court and ensuring that it can exercise its jurisdiction according to the definition adopted (that allows the judges to consider the circumstances of each case). Moreover, it should be mentioned the (potential) universal jurisdiction of the Court when in question are UNSC referrals, since it

¹⁵¹ UNGA, Report of the Ad Hoc Committee (1995), *op. cit.*, para. 71.

¹⁵² Article 15 *bis*, paragraph 6.

¹⁵³ Article 15 *bis*, paragraph 7.

¹⁵⁴ Article 15 *bis*, paragraph 8.

¹⁵⁵ BARRIGA, Stefan and GROVER, Leena (2011), *op. cit.*, p. 530.

has no limitations regarding non-States Parties or non-ratifying States Parties, due to the lack of particularities of article 15 *ter*, especially when compared to article 15 *bis*.

b. Opt-Out

One of the innovations of the Kampala amendments was **article 15 *bis*, paragraph 4**, that states:

“The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. (...)”

This article establishes the possibility of opting-out of the jurisdiction of the Court, providing a possible incentive for States to join the ICC, since they could always declare that they wish to be exempted from the jurisdiction of the Court over the crime of aggression¹⁵⁶. It was intended to be a technical tool at the disposition of States that would allow the delay or the exclusion of the consequences of activating the Court’s jurisdiction for States unready to criminalize aggression.

Relating with the general jurisdictional regime exposed before¹⁵⁷, based on article 12 of the Rome Statute, this mechanism was an attempt to bridge the gap between the different views of States Parties, regarding the need to have consent by the territorial State or by both the territorial and nationality State. In other words, some States Parties believed that only the victim State should be required to have ratified the amendments for the jurisdiction of the Court to apply and others believed that ratification by the State Party of which the perpetrator is a national should also be required¹⁵⁸.

¹⁵⁶ HELLER, Kevin Jon (13 Jun. 2010), *op. cit.*

¹⁵⁷ See Part II – section b).

¹⁵⁸ In BARRIGA, Stefan and GROVER, Leena (2011), *op. cit.*, pp. 525-526.

This was the main divergence that characterised Kampala, only overcome by the “ABCS Non-Paper” (proposed by Argentina, Brazil, Canada and Switzerland)¹⁵⁹, which found a solution that would accommodate the several positions, either in excluding non-States Parties¹⁶⁰, either in allowing States Parties that did not want to be subject to the jurisdiction of the Court to lodge a declaration in that sense.

This meant that States Parties were not required to opt-in or ratify before they could lodge the opt-out, proving to be, actually, an indicator that the Court could indeed exercise its jurisdiction over a State Party that has not ratified the amendments, if only the victim State had ratified. This will be explored later¹⁶¹, since it relates with exposition of the two camps of interpretation that characterised Kampala (and New York).

However, this new tool presents several difficult implications for the Court and its exercise of jurisdiction, when considering the phrasing of paragraph 4. Indeed, the possibility of opting-out appears in relation with acts of aggression committed by nationals of States Parties and makes no mention to the element of territoriality. For instance, this possibility leads to (unequal) situations: where a national of a State Party that has opted-out commits an act of aggression against the territory of a State Party that has not opted-out, then the aggressor State Party cannot be subject to prosecution by the Court, because it excluded itself from the jurisdiction, but the opposite presents a different situation; if a national of a State Party that has not opted-out commits an act of aggression against the territory of a State Party that has opted-out, then it can be subject to the jurisdiction of the Court. As CORACINI puts it, since this declaration of non-acceptance only affects potential acts of aggression committed by the State Party that has opted-out, the

¹⁵⁹ KREß, Claus and HOLTZENDORFF, Leonie von (2010), *op. cit.*, pp. 1202-1204.

¹⁶⁰ Pursuant to article 15 *bis*, paragraph 5, explored in the next section.

¹⁶¹ See next section.

possibility of the Court of exercising jurisdiction in relation to “such State that becomes a victim of aggression remains unaltered”¹⁶².

HELLER calls this situation a “hypocritical approach to aggression”¹⁶³ and, in truth, it reflects a certain perversion of the system, by, on one hand, giving an extension of protection to the territory of opt-out States and, on the other hand, taking away the protection that the territory of States Parties that have not opted-out should receive.

In addition, MANSON questions the conformity of this provision with the principle of reciprocity, because it goes against “equality of all before the rule of law in a criminal jurisdiction”¹⁶⁴, and, as a matter of fact, this distinction between opting-out State and non-opting-out State, where the first receive protection if attacked, while the second stays in a precarious situation, may be discriminatory. This author also explains that the same does not happen to accepting or ratifying States Parties and non-accepting or non-ratifying States Parties, because where a national of a State Party that has accepted the amendments commits a crime of aggression in the territory of a non-accepting State Party, according to the wording of article 121, paragraph 5, the ICC cannot exercise its jurisdiction. However, there are two views on the interpretation of this provision, as will be explained, that make this conclusion not as straightforward.

Basically, this distinction leads to the creation of two sets of States Parties, that in nothing are different, unless the fact that one has not ratified and the other has opted-out. This should result in the same legal position, since both these States Parties are not subject to the jurisdiction of the Court, but instead it creates a fragmented system with jurisdictional consequences for two States in the same position.

¹⁶² CORACINI, Astrid – “More Thoughts on ‘What Exactly was Agreed in Kampala on the Crime of Aggression’”. *EJIL: Talk!* (2 Jul. 2010), available at <https://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>.

¹⁶³ HELLER, Kevin Jon Heller (13 Jun. 2010), *op. cit.*.

¹⁶⁴ MANSON, Robert L. – “Identifying the Rough Edges of the Kampala Compromise”. *Criminal Law Forum*. Vol. 21, No. 3 (2010), p. 432.

The first operative paragraph (OP) of the Kampala Resolution states that this declaration of non-acceptance can be lodged prior to the ratification or acceptance of an amendment. The question that immediately follows is why would States Parties wish to make such declaration, before proceeding with the ratification of the amendments¹⁶⁵? According to MANSON¹⁶⁶ and AKANDE¹⁶⁷, a State can choose to lodge an opt-out because it wishes, for example, to contribute to the number of States Parties' ratifications of the amendment, allowing the above-mentioned condition of 30 ratifications of States Parties to be met faster¹⁶⁸ and consequently activating the Court's exercise of jurisdiction, but at the same time wishes to stay out of this scope of jurisdiction and avoid prosecution. This seems to be an overly positive and even naïve line of thought, considering that States are most of the times very self-centred, and it is highly doubtful that States would want to activate the protection granted by the activation of the jurisdiction only for the sake of the advancement of international criminal justice.

Moreover, there is also the question of the determination or the will of States Parties to make this declaration of non-acceptance, because it can come across as a message of that State being against international criminal law and accountability¹⁶⁹ and thus affect its image across the international community and damage its relations. HELLER is, however, of the belief that States will not have a problem opting-out, because for a State that commits an act of aggression against another State, the reputational cost that it represents is minimal¹⁷⁰.

Furthermore, the operationalization of this declaration of non-acceptance received some attention at the ASP in 2017, as several delegations attempted at

¹⁶⁵ Such question relates with the interpretations given to article 121, paragraph 5, in connexion with the mechanism of the opt-out. It is recommended to read this section in conjunction with part d).

¹⁶⁶ *Idem*, p. 427.

¹⁶⁷ AKANDE, Dapo (21 Jun. 2010), *op. cit.*

¹⁶⁸ Of course, at the time of writing this paper, this argument no longer applies, as the 30 ratifications have been met.

¹⁶⁹ AKANDE, Dapo – “The ICC Assembly of States Parties Prepares to Activate the ICC’s Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction?”. *EJIL: Talk!* (26 Jun. 2017), available at <https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/>.

¹⁷⁰ HELLER, Kevin Jon (13 Jun. 2010), *op. cit.*

making sense out of the process and how it would interrelate with the rest of the Kampala amendments, since these do not establish specifically how a declaration of this nature would be made. In this sense, both after Kampala and then in the ASP, there were some concerns about whether the opt-out declaration would need parliamentary approval or go through the specific procedures of the States Parties legal frameworks, since it presents some similarities with treaty reservations¹⁷¹ (which are totally excluded from the Rome Statute, according to article 120)¹⁷².

In addition, it should be taken into account article 15 *bis*, paragraph 4, that besides establishing the mechanism of opt-out of the jurisdiction, also provides that the Court may exercise jurisdiction according to article 12, and once again that OP1 of the Kampala Resolution notes that the opt-out can be made prior to ratification or acceptance by the State Party. These two provisions will be important when considering specifically the legal implications of the entirety of the Kampala amendments.

Also worth mentioning is Kenya, which was the first case where a State Party has made a declaration of non-acceptance on 30 November 2015, because of concerns with the distinction between an act of aggression and a war of aggression¹⁷³, but that is certainly related with the problems raised on the 12th session of the ASP concerning the indictment of Heads of State in Office¹⁷⁴.

c. Exception to the general jurisdictional regime

Another innovation of the Kampala amendments was **article 15 bis, paragraph 5**, which represents a complete reversal of the general principle of exercise of jurisdiction by the ICC. As explained, according to article 12, alleged crimes (in the case of genocide, crimes against humanity, war crimes) committed

¹⁷¹ Article 2, item d), of the VCLT defines reservation as a “unilateral statement, however phrased or named, by a State, when signing, ratifying, accepting, approving or acceding a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions to the treaty in their application to that State”.

¹⁷² CORACINI, Astrid (2 Jul. 2010), *op. cit.*

¹⁷³ Declaration of non-acceptance by Kenya, available at https://www.icc-cpi.int/iccdocs/other/2015_NV_Kenya_Declaration_article15bis-4.pdf.

¹⁷⁴ TELES, Patrícia Galvão – “The International Criminal Court and the evolution of the idea of combating impunity: an assessment 15 years after the Rome Conference”. In KOWALSKI, Mateus and TELES, Patrícia Galvão (2017), *op. cit.*, pp. 130-133.

by a national of a non-State Party in the territory of a State Party are subject to the ICC jurisdiction, irrespective of what is the trigger mechanism, if State referral, *proprio motu* investigation by the Prosecutor or UNSC referral.

Contrary to this, in the case of the crime of aggression, there is a total exemption of non-States Parties from the scope of jurisdiction of the Court, for reasons of political convenience¹⁷⁵, representing a substantial restriction in the capacity of intervention of the Court. This regime applies to cases of State referral and *proprio motu* investigation by the Prosecutor, whilst UNSC referrals remain unlimited irrespective of who has accepted the jurisdiction of the Court or has made a declaration of non-acceptance, according to article 15 *ter* and confirmed by Annex III of Resolution RC/Res. 6, in its *Understanding* no. 2. Thus, the Review Conference unknotted the ball of thread that could be the role of the UNSC regarding its own referrals, giving it universal reach, but it may be said that it created a new one in relation with State or *proprio motu* referrals, especially in what concerns States Parties, as will be demonstrated in the next section.

Accordingly, in the case of State referrals or *proprio motu* investigation, this new regime means that the express consent of an aggressor non-State Party is needed for the Court to be able to exercise its jurisdiction¹⁷⁶, an unlikely, to say the least, situation to occur, as well as the chances of the UNSC to refer itself the situation to the ICC are extremely low, given the possibility of veto by the Permanent Members.

This leads to a situation of lack of jurisdiction of the Court if a national of a State Party commits an act of aggression against the territory of a non-State Party¹⁷⁷. According to the wording of article 15 *bis*, paragraph 5, the Court cannot exercise jurisdiction concerning non-States Parties over “the crime of aggression when committed by that State’s nationals or in its territory”. This is not what

¹⁷⁵ POLITI, Mauro, In STEINER, Sylvia Helena and BRANT, Leonardo Nemer Caldeira (2016), *op. cit.*, pp. 242-243.

¹⁷⁶ Under article 12, paragraph 3, of the Rome Statute.

¹⁷⁷ In favour of this understanding, HELLER, Kevin Jon (13 Jun. 2010), *op. cit.*

happens when one considers article 15 *bis*, paragraph 4, which allows the Court to exercise jurisdiction when a State Party that has not opted-out commits an act of aggression in a State Party that has opted-out¹⁷⁸.

An interesting thought is if in this exercise of jurisdiction relating to non-States Parties it matters to have accepted the amendments or not or even if the State has made a declaration of non-acceptance or not, although such is not suggested in the literal interpretation of paragraph 5, of article 121.

Therefore, answering that the lack of jurisdiction of the ICC concerning non-States Parties is irrespective of the existence of ratification or of a declaration of non-acceptance can have its advantages. To start with, it would avoid interpretative issues related to the legal effects of the omission by a State Party in presenting such a declaration of non-acceptance¹⁷⁹, especially because the amendments did not provision a deadline for the lodging of such a declaration. It would establish, however, a position of privilege of non-States Parties that are totally outside the Court's jurisdiction, in what concerns the crime of aggression, especially of the Permanent Members of the UNSC, that retain the possibility of veto.

That being said, this provision is highly damaging for the Court. Besides ignoring the culture of accountability that the Rome Statute aimed to create when it extended the jurisdiction of the Court according to both elements of nationality and territoriality, it has the effect of impeding the potential universality of the ICC. In fact, by excluding non-States Parties from its jurisdiction when a crime of aggression is concerned, it creates a situation where the advantages of joining the Rome Statute by the big powers, such as by the USA, China, the Russian Federation, or India, are limited. As it stands, there is no risk for them of being targeted by the ICC's procedures¹⁸⁰ and they would not receive the protection

¹⁷⁸ See previous section.

¹⁷⁹ POLITI, Mauro, In STEINER, Sylvia Helena and BRANT, Leonardo Nemer Caldeira (2016), *op. cit.*, pp. 245-246.

¹⁸⁰ *Idem*, pp. 242-243.

granted by the ICC system anyways, since the exclusion of paragraph 5 of article 15 *bis* covers both nationality and territoriality.

Another question that has to be asked is why would States Parties, the negotiators of the Kampala amendments and already part of the system of international criminal justice, would want to deprive themselves from the protection granted by the general exercise of jurisdiction according to article 12¹⁸¹? By agreeing to this provision, States Parties are “rejecting” the protection that otherwise would be granted by the general exercise of jurisdiction of the ICC against acts of aggression committed against themselves, including committed by non-States Parties, thus allowing a culture of impunity to continue.

In fact, the answer to this question is related with the compromise achieved between the States that want more protection (shared by most of States Parties, including the majority of European States) and those that do not want to be held accountable by their international interventions (United Kingdom, France, Canada, also the USA, as an Observer State). It led to the condition that in order for the Court to exercise its jurisdiction would need the consent of States Parties by consenting to remove the requirement of a prior determination by the UNSC for the Court to initiate proceedings, whenever a crime of aggression is in question. KREß and HOLTZENDORFF call this new regime “the ultimate compromise built upon a combination of a Security Council-based and a consent-based ICC jurisdiction over the crime of aggression”¹⁸². This compromise will have deep impact in the jurisdictional regime of the crime of aggression amendments, that in turn will be more restrictive, as will be explained next.

d. Legal interpretations of the Kampala amendments

After analysing the regime created for the crime of aggression as set out in Kampala, one major question arises that plagued the negotiations in New York and the leading up period. Would the Court have jurisdiction over a national of a State Party that has not ratified the Kampala amendments and not made a declaration of

¹⁸¹ HELLER, Kevin Jon (13 Jun. 2010), *op. cit.*

¹⁸² KREß, Claus and HOLTZENDORFF, Leonie von (2010), *op. cit.*, p. 1195.

non-acceptance if he or she commits a crime of aggression in the territory of a State Party that has ratified and has not made a declaration of non-acceptance of the jurisdiction of the Court? In truth, there are two divergent positions regarding this question, that both in 2010 and in 2017, were divided in what was called camp-consent and camp-protection¹⁸³.

Firstly, the discussion focused on the entry into force of the amendments and trying to decide what would be the appropriate provision for the entry into force. For instance, **article 121, paragraph 3**, would be instantly excluded, because it establishes the majority required for the adoption of an amendment, that is quite different from the provisions that concern the entry into force of the amendments¹⁸⁴.

Hereinafter comes **article 121, paragraph 4**, according to which an amendment enters into force after the ratification or acceptance by seven-eighths of States Parties making all States Parties bound to it “equally and without distinction”¹⁸⁵. It has the obvious advantage of unlimiting the amendments to articles 5, 6, 7 and 8, and unrestricting the exercise of jurisdiction for States Parties that have not accepted the provisions on the crime of aggression, as in the case of article 121, paragraph 5. However, it has the obvious disadvantage of requiring seven-eighths of States Parties to ratify the amendments for them to enter into force. Considering the political nature of the crime of aggression and even the difficulty in achieving consensus that have characterised the past decades of international criminal law in this particular subject, it is highly doubtful that this number would ever be reached. However, there were some States Parties that would accept waiting for that kind of level of ratification, if that could mean an

¹⁸³ This section will be divided in an exposition of each of the two camps with a critique to both and in the end some final considerations.

¹⁸⁴ KREß, Claus and HOLTZENDORFF, Leonie von (2010), *op. cit.*, p. 1196, that call it the “Adoption model”.

¹⁸⁵ MANSON, Robert L. (2010), *op. cit.*, p. 420.

“equal subjection to the exercise of jurisdiction by the Court without distinction”¹⁸⁶, though presently it is highly fragmented, as will be demonstrated.

In fact, the discussions also point to the importance of distinguishing between the entry into force of the amendments, or being bound by them, and the exercise of jurisdiction by the Court¹⁸⁷. In fact, because of the unlikeness of these two provisions to be applied in the case of the crime of aggression, the two camps that answer the dilemma previously exposed actually focus on article 121, paragraph 5, and on article 5, paragraph 2, and article 12, and analyse the entry into force and jurisdiction together.

Therefore, **article 121, paragraph 5**, in its first sentence states that an amendment to articles 5, 6, 7 and 8 enters into force one year after the ratification or acceptance of each State Party of the amendment, thus the entry into force of the amendment occurs in a state-by-state basis¹⁸⁸; and its second sentence establishes that the Court cannot exercise its jurisdiction if a crime is committed by a national or in the territory of a State Party that has not ratified the amendments in question. SCHEFFER calls the choosing of article 121, paragraph 5, along with the imposition of the three conditions listed above¹⁸⁹, “an artful albeit fragile compromise”, because it runs away from the requirement of seven-eighths of ratifications by conditioning the entry into force with the requirement of ratification by at least 30 States Parties¹⁹⁰.

This provision is the legal basis for the negative answer to the question above¹⁹¹, represented by **camp-consent**, also called the **narrow view**¹⁹², that considers that these nationals are totally exempted from the jurisdiction of the

¹⁸⁶ *Idem*, p. 421.

¹⁸⁷ CORACINI, Astrid (2 Jul. 2010), *op. cit.*

¹⁸⁸ MANSON, Robert L. (2010), *op. cit.*, p. 420.

¹⁸⁹ See beginning of the section c) – Kampala amendments.

¹⁹⁰ Conditions previously presented on Part II – Section c).

¹⁹¹ Would the Court have jurisdiction over a national of a State Party that has not ratified the Kampala amendments and not made a declaration of non-acceptance if he or she commits a crime of aggression in the territory of a State Party that has ratified and has not made a declaration of non-acceptance of the jurisdiction of the Court?

¹⁹² Supported mainly by France, United Kingdom, Japan, Canada, and USA, even though they have the Status of an Observer State.

Court. Simply, because the State Party did not ratify the amendments, it cannot be bound to the amendments¹⁹³. Therefore, for such nationals to be exempt, there is no need for States Parties to present a declaration of non-acceptance of the jurisdiction (opt-out) and it is irrespective of the ratification or lack thereof of the amendments by the victim State Party. According to this position, the consent of the aggressor State Party would always be necessary for the Court to begin proceedings. In other words, this negative understanding concludes that if the State Party of which the alleged perpetrator is a national or in whose territory the crime is allegedly committed has not ratified or accepted the provisions on the crime of aggression, then the Court has no jurisdiction over it¹⁹⁴. This means the exclusion of the Court's jurisdiction in the case of non-ratification of the amendments both by the aggressor State and by the victim State, since consent has not been given.

Some authors¹⁹⁵, nevertheless, question if the new provisions on the crime of aggression can be considered an amendment to “articles 5, 6, 7 and 8”, in order to exclude application of article 121, paragraph 4, that is the general rule. In fact, the Kampala amendments include both the definition, that in principle would be covered by article 121, paragraph 5, since it relates to one of those articles, but also the conditions of the exercise of jurisdiction. It is very doubtful that both of them have to be covered by article 121, paragraph 5, since their subject-matters are different.

Although, it could be argued that such argument leads to the application of a variety of regimes of entry into force, that can be somewhat difficult to implement and may bring incoherency to the application of the Rome Statute by the Court. One could also say, in contrast, that this is the normal functioning of the Rome Statute that in its original version decided to include this distinction between States that ratify and those that do not; furthermore, it is recognized as a general principle of law of treaties, that a State, when joining a treaty, can choose

¹⁹³ POLITI, Mauro, In STEINER, Sylvia Helena and BRANT, Leonardo Nemer Caldeira (2016), *op. cit.*, p. 245.

¹⁹⁴ KREB, Claus and HOLTZENDORFF, Leonie von (2010), *op. cit.*, pp. 1196-1197.

¹⁹⁵ *Ibidem*.

to ratify the original version or the one with amendments¹⁹⁶, as a true exercise of its jurisdiction, creating therefore a fragmented system of jurisdiction.

In this line of thought, AKANDE, initially recognizes that the aggression amendments go beyond amendments to those specific provisions. He says, however, that the amendments should be considered a “package”, which includes both the definition and the conditions for the exercise of jurisdiction, “intended to bring into effect the ‘new’ crime and that the intention behind Art. 121(5) is that it applies to amendments dealing with the creation of new crimes”¹⁹⁷. Additionally, he says that such package could have been included entirely in one article and it would have the same effect.

This interpretation was rejected by a majority of States throughout the *travaux préparatoires* and the Review Conference¹⁹⁸, for going against the main purpose of the ICC of offering protection to international human rights and not only the traditional protection of States’ sovereignty, through the criminalisation of aggressive warfare.

The positive answer to the above-mentioned question finds its advocates in **camp-protection** or **broad view** that demands for, as the name suggests, a broader interpretation of the several provisions of the Rome Statute, taking into account the compromise reached in Kampala. According to this systematic interpretation, the ratification of the amendments (the consent) by the State Party that was the victim of aggression would be enough for the jurisdiction of the Court to be enabled, under the general principle established in article 12, as long as a declaration of non-acceptance would not have been lodged by the aggressor State¹⁹⁹. A majority of States favoured this approach, a majority that was replicated in 2017, as will be demonstrated, when describing the negotiations at the ASP.

¹⁹⁶ Article 40, paragraph 5, of the VCLT – “The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.”

¹⁹⁷ AKANDE, Dapo (26 Jun. 2017), *op. cit.*

¹⁹⁸ KREß, Claus and HOLTZENDORFF, Leonie von (2010), *op. cit.*, pp. 1195-1996.

¹⁹⁹ As seen, if only the victim State Party had opted-out and not the aggressor State, the Court would still be able to exercise its jurisdiction, because of the phrasing of paragraph 4 of article 15 *bis*.

This interpretation is supported by CORACINI²⁰⁰, that argues that because of this jurisdictional reach (which only requires the consent of the victim State), the negotiations led to the inclusion of two exceptions in the regime that came out of Kampala: article 15 *bis*, paragraph 5, to ensure that non-States Parties would be completely outside the jurisdictional scope of the Court, and paragraph 4, by creating the mechanism of the opt-out. In truth, it was the inclusion of both these compromises that led to the unblocking of the negotiations in 2010, and ultimately resulted in Resolution RC/Res. 6, as seen with the “ABCS Non-paper”.

This signifies that, as happens with the exercise of jurisdiction in relation to the other three core crimes, the Court would be able to exercise jurisdiction when a crime of aggression is committed in the territory of a State Party²⁰¹, as long as the such State had accepted the amendments and the aggressor State had not lodged an opt-out. The second sentence of article 121, paragraph 5, would only equalize the position of non-ratifying States Parties to non-States Parties, when the condition for the exercise of jurisdiction would be nationality.

In addition, according to this camp, States Parties to the Rome Statute, have already accepted the jurisdiction of the Court over the crime of aggression, because since 1998 that this crime has been included in article 5, that lists four crimes within the jurisdiction of the Court, and because article 12, paragraph 1, states that “1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.” Plus, article 5 gave a mandate to the Review Conference to adopt *suis generis* conditions for the exercise of jurisdiction²⁰², that would act almost as *lex specialis* in relation to the 1998 Rome Statute version²⁰³. Accordingly, article 121, paragraph 5, must be read in conjunction with article 5, paragraph 2, and article 12.

²⁰⁰ CORACINI, Astrid (2 Jul. 2010), *op. cit.*

²⁰¹ Article 12, paragraph 2, item (a) of the Rome Statute.

²⁰² Recalling paragraph 2 of article 5 as demonstrated in Part II – section b).

²⁰³ MANSON, Robert L. (2010), *op. cit.*, p. 423.

However, the advocates of camp-consent argue that it would be impossible for States Parties to accept in advance the jurisdiction of the Court over the crime of aggression and that is why article 5, paragraph 2, prescribes for the establishment of the conditions of jurisdiction at a later date²⁰⁴. In addition, they sustain that this provision is still in effect, since it has not been formally modified and it was actually integrally applied in relation to the Kampala amendments of article 8 regarding war crimes²⁰⁵.

This positive interpretation of article 121, paragraph 5, in the context of other provisions of the Statute, also raises some problems when considering that non-States Parties, when ratifying the Rome Statute (original or amended version), must implement or change their national legislations according to their legal systems to be in conformity with the Rome Statute. AKANDE also suggests the possibility of the presumption of acceptance of the amendments, if the State Party does not lodge a declaration of non-acceptance, meaning that only those that do lodge this declaration would be considered as not accepting the amendment and thus the principle of consent would be ensured²⁰⁶. If one would accept these interpretations, it could admittedly mean the contradiction with principles of treaty law, as established by article 40, paragraph 4²⁰⁷, of the VCLT²⁰⁸, that requires the express acceptance of the amendment by States Parties.

In addition, the Kampala Resolution is also problematic because it states that the amendments “are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5”²⁰⁹. This resolution clearly indicates that this provision is essential for the entry into force of the amendments and it does not distinguish between the first and the second sentence, that would of course be decisive in determining which camp applies. If one would say that the

²⁰⁴ *Idem*, p. 426.

²⁰⁵ AKANDE, Dapo (26 Jun. 2017), *op. cit.*

²⁰⁶ AKANDE, Dapo (21 Jun. 2010), *op. cit.*

²⁰⁷ It reads as follows: “4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(6), applies in relation to such State.”

²⁰⁸ AKANDE, Dapo (26 Jun. 2017), *op. cit.*

²⁰⁹ OPI of Res. RC/Res. 6 (2010), *op. cit.*

first sentence applies but not the second, it would give rise to a case of “cherry-picking”, a term coined mainly by camp-consent during the ASP.

As demonstrated, the two positions go on two different paths of interpretation of the provisions, one literal and the other systematic, and each one of them seems to have aspects in favour and aspects against. In this regard, KREß and HOLTZENDORFF suggest that from article 5, paragraph 2 (original version of the Rome Statute) and article 121 results a “fundamental ambiguity”²¹⁰.

Both positions, however, lead to a deep fragmentation of the Rome Statute and the jurisdiction of the Court over the crime of aggression. To begin with, the jurisdictional regime over the crime of aggression is substantially different from the one applied to the other three core crimes. When considering referrals by the UNSC, the regime is uniform and universal, since there are no limitations regarding nationality or territoriality. However, when considering State referrals or *proprio motu* investigations by the Prosecutor, the system becomes fragmented and confusing to apply. Therefore, the analysis of the jurisdiction is dependent on the confirmation of one of the two camps, as presented above.

If one accepts the legal interpretation of camp-consent, within the jurisdiction of the Court would be States Parties that have ratified the Kampala amendments and that have not lodged a declaration of non-acceptance, with the important distinction between aggressor and victim States. If one subscribes to the position demonstrated above, a victim State Party that has opted-out and an aggressor State Party that has not, then the case can be subject to the jurisdiction of the Court (due to the phrasing of article 15 *bis*, paragraph 4)²¹¹. Outside of the jurisdiction of Court would be non-States Parties, States Parties that have not ratified the amendments, irrespective of the lodging of a declaration of non-acceptance, and aggressor States Parties that have ratified, but that have lodged an opt-out (even if the victim State Party ratified the amendments and did not lodge an opt-out). In this situation, a State Party that has not accepted the amendments,

²¹⁰ KREß, Claus and HOLTZENDORFF, Leonie von (2010), *op. cit.*, p. 1215.

²¹¹ See Part II – Section c) – lit. ii).

by not ratifying, will be in the same position as a non-State Party, because of the wording of articles 121, paragraph 5, and 15 *bis*, paragraph 5; such is controversial, considering that a State Party has accepted to be subject to a system of international criminal justice, when decided to ratify to the Rome Statute.

Contrastingly, if one takes into account the position advocated by camp-protection, within the jurisdiction of the Court would be States Parties to the Rome Statute, irrespective of the ratification of the Kampala amendments, since the central instrument would be the opt-out, with the important distinction between aggressor and victim States as well: only if the aggressor State has not lodged a declaration of non-acceptance, it can be subject to the jurisdiction of the Court. Opposingly, outside the jurisdiction of the Court would be non-States Parties, aggressor States Parties that have not ratified the amendments, but that have lodged an opt-out, and aggressor States Parties that have ratified and that lodged an opt-out.

The conclusion is that the position defended by camp-protection offers a broader scope of protection to States Parties, even to those who have not ratified the amendments, but the position advocated by camp-consent offers more legal certainty, considering a literal interpretation of the Rome Statute and the amendments.

e. Position defended

Taking into account the prior exposition about the Kampala regime, it is now opportune to make some considerations about the same. Firstly, the Rome Statute establishes in article 121, paragraphs 4 and 5, the regime of entry into force of an amendment, where paragraph 4 works as the general rule, or *default provision*, as MANSON states²¹², while paragraph 5 must be divided in two sentences: the first deals also with the enter into force of an amendment, constituting the exception to the general provision of paragraph 4; however, the second sentence deals with something separate, which is the jurisdiction of the

²¹² MANSON, Robert L. (2010), *op. cit.*, p. 422.

Court. In this case, one cannot assume both sentences apply to the crime of aggression, because there is also an exception to the general rule of article 121, paragraph 5, second sentence, that is composed by articles 5, paragraph 2, in the original version of the Rome Statute, and 12, paragraph 1.

These latter two paragraphs led to creation of a creative jurisdictional regime, that revolves mainly around article 15 *bis*. By creating the new mechanism that is being loosely called the opt-out, States Parties agreed on a compromise solution between the necessity of ratification by both States involved in this type of conflict or the need for only one of them to ratify, the victim State. This way, States that opt-out can safeguard their legal positions, by not being inside the scope of the jurisdiction of the Court, and should not enforce their position on others, impeding the States that want more protection to receive it.

In fact, as the first sentence of paragraph 5, of article 121, is the exception to the rule of paragraph 4, the same stands for the jurisdictional regime that came out of Kampala in relation to the second sentence of paragraph 5²¹³. When the Kampala Resolution refers to article 121, paragraph 5, in its OP1, it alludes to its first sentence that is related with the entry into force of the amendments, while its second sentence can be considered revoked, but only regarding the crime of aggression and the jurisdictional regime created in Kampala.

Moreover, the Kampala Resolution established also in OP1 that an opt-out declaration can be lodged before the State Party proceeds with ratification or acceptance of the amendments. The only conclusion that makes sense considering this statement is that the jurisdiction of the Court applies to a State Party that has not yet ratified or accepted the amendment, unless it makes this declaration²¹⁴. If anything on the contrary would be argued, then why was the compromise of the opt-out presented as it currently stands at the Kampala Review Conference? MANSON argues that this possibility of opt-out prior to ratification by a State Party can be done by reason of “diplomatic caution, rather than legal necessity”²¹⁵,

²¹³ MANSON, Robert L. (2010), *op. cit.*, p. 423.

²¹⁴ *Idem*, p. 427.

²¹⁵ *Idem*, pp. 427-428.

to ensure that its position is known and that it absolutely does not accept the jurisdiction of the Court when a crime of aggression is in question. It is questionable however that this was the reasoning behind the drafters at Kampala²¹⁶.

Of course, this line of thought would support the idea that jurisdiction may come before the entry into force, which may also be controversial, when considering State sovereignty. It is, nevertheless, good to keep in mind that presently the same happens to non-States Parties, that are not bound to the Rome Statute, but fall under the jurisdiction of the Court if one of their nationals commits any of the other three core crimes against the territory of a State Party, according to article 12 and the element of territoriality²¹⁷.

CORACINI makes a good point, however, that may put the previous considerations in question. This author says that the opt-out declaration should only be possible after ratification of the amendments by the State Party. Since the opt-out declaration is provisioned in the amendments, only after these enter into force for that State Party, should that declaration be possible to lodge. According to her, making this declaration prior to ratification proves difficult to conform with the prohibition of reservations established in article 120²¹⁸.

Although both arguments have validity and simultaneously deep flaws, there are some principles that may have to prevail, namely the respect for the law of treaties and the fact that consent is necessary for the amendments to apply to a certain State Party. Indeed, article 40, paragraph 4, of the VCLT deals with State Parties that do not become a Party to the amending agreement, in an effort to find a “balance between the stability of the contractual relations and the states’ freedom of decision making”²¹⁹. Questioning this can lead to a somewhat “anarchy” in the

²¹⁶ As Coracini pointed out, “there was no plenary debate on the last three versions of the President’s non-paper and the Draft Resolution. The preparatory works are therefore of limited help with regard to the interpretation of some parts of the Resolution.”. In CORACINI, Astrid (2 Jul. 2010), *op. cit.*

²¹⁷ However, many question the legality of article 12 of the Rome Statute considering the law of treaties.

²¹⁸ CORACINI, Astrid (2 Jul. 2010), *op. cit.*

²¹⁹ DÖRR, Oliver and SCHMALENBACH, Kirsten, eds. – *Vienna Convention on the Law of Treaties – A commentary*. Berlin, Heidelberg: Springer-Verlag, 2012. pp. 709-717.

conclusion and amendments of future treaties, that may prove damaging for legal certainty and that can contribute to an increase on the breaches of treaty provisions by States Parties.

Even if there is agreement in this conclusion, some more thought should be given to the importance of the crime of aggression being included in the jurisdiction of the Court and that its exercise thereof should be unconditional or unlimited. There should be automatic jurisdiction given to the crime of aggression, irrespective of ratification or acceptance, in the basis of article 12, that in 1998 represented a big step towards accountability and presently seems to have reverted backwards.

III. ACTIVATION OF THE JURISDICTION OF THE ICC OVER THE CRIME OF AGGRESSION

This section will consist of a brief exposition about the process that preceded the activation of the jurisdiction of the Court over the crime of aggression, namely the convening of a facilitation to allow States Parties to expose their views and questions and subsequently the 16th session of the ASP. In the end, some considerations will be made regarding the adoption of Resolution ICC-ASP/16/Res.5 and the regime therein.

a. Facilitation

The first of the three conditions introduced above²²⁰, the ratification of 30 States Parties to the Rome Statute, was met on 26 June 2016, with the ratification of the State of Palestine. Six months later, the second condition would also be met. This meant that 2017 was the perfect opportunity for the 16th session of the ASP to activate the Court's jurisdiction over the crime of aggression.

To this result, in the 15th session of the ASP, States Parties decided to convene a facilitation that would be carried out throughout the following year, in order to enable the activation by a consensual decision, open to all States Parties, with the aim of producing agreement in the ASP and a final report that would summarise such process²²¹. Additionally, delegations agreed on having expert briefings to foster discussions and an understanding of both positions that characterised Kampala.

The facilitation had seven meetings, held in the UN Headquarters in New York, chaired by the Legal Adviser of Austria, Nadia Kalb²²², who demonstrated incredible diplomatic skills in dealing with the several States Parties throughout the year, but especially during the two weeks of the ASP.

²²⁰ See Part II - section c).

²²¹ ASP Report ICC-ASP/16/24 (27 Nov. 2017), on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression.

²²² *Idem*, para. 5-6.

The mentioned report presented several conclusions, that included: the need to raise awareness on the amendments provisions and, implicitly, that all the conditions conducive to the activation of the jurisdiction of the Court on the 16th session of the ASP were met; the *quasi*-obligation not to reopen the discussions had in Kampala; that the majority of States Parties were in favour of activation of the jurisdiction of the court, as early as possible; the need of a standalone resolution for the activation decision; the commitment to work together in the process that followed and continue discussions; and, finally and most importantly, that the States agreed in a broad convergence of subjects, minus in one - the jurisdiction of the Court over the crime of aggression when committed by a national of a State Party, that has not ratified the amendments and not made an opt-out declaration, against the territory of a State Party that had ratified the amendments²²³.

Throughout the facilitation process, the majority of States Parties expressed their willingness to activate the jurisdiction of the Court in this year's ASP. It was widely recognized that the activation decision had to be consensual, because otherwise it would undermine the legitimacy and credibility of the Court, especially considering the dividedness that the crime of aggression embodies. As the representative of a State in one of the meetings put it, "anything less than consensus would be a collective failure" for international criminal justice and the effectiveness of the ICC in its mandate of ensuring accountability. This has to be contextualized in the fact that the ICC has only 15 years of functioning and the fact that it is a constant target of criticism, for instance, because of the lack of Asia-Pacific representation in the States Parties or because of allegations of bias against Africa. Thus, at all costs, States Parties were trying to avoid a vote or even the mention of a vote. Yet, it remained present in every diplomats' mind, since a consensus solution was nowhere in sight.

At a certain point, besides the discussions about the major controversies, the facilitation turned for the introduction of possible elements of activation, that in itself represented a contentious debate, arising questions about the broadness of

²²³ *Idem*, para. 11-13.

the mandate of the facilitation. However, several proposals were submitted, the ones by Switzerland, United Kingdom (UK)/France, and Palestine²²⁴ being the most important, which were a reflection of the different positions and that would be the basis of work for the weeks that were to come.

The proposal by Switzerland represented what became known during the facilitation process and later on in the ASP as a “simple decision”, because it did not take any conclusion on the different positions as presented above and it simply decided to activate the Court’s jurisdiction. Its premise was neutrality in the choosing of a position, in order to let the Court decide about its own jurisdiction and what was the correct interpretation of the Rome Statute and the Kampala amendments.

UK and France, the proponents of one of the other initial proposals, called for the necessity of certainty regarding the position of nationals of States Parties that have not accepted the amendments, considering the ambiguity that resulted from Kampala. Although clarification about this subject would be much appreciated, considering the deep contradictions that the new provisions represent²²⁵, this proposal as a matter of fact only reflected the narrow view, which is the position defended by these countries, in which a crime committed by a national or in the territory of a State Party that has not ratified the amendments cannot be subject to the exercise of jurisdiction of the Court. This reflects the narrow understanding of article 121, paragraph 5, as exposed above, that was felt necessary because of the special nature of the crime of aggression and the possibility of prosecuting Heads of State or those who exercise political or military control over a State.

On the opposite side, the proposal submitted by Palestine recognized camp-protection, based on article 15 *bis*, paragraph 4, by which the ICC can exercise jurisdiction over a crime of aggression committed by a State Party, if that State has not opted-out, irrespective of the ratification by the State.

²²⁴ Included in Annex I of this paper.

²²⁵ Explained in detail in Part II – section c).

The facilitation meetings were, therefore, characterised by a constant exposition of the different camps by the respective States that supported them and also the attempt of some States to conciliate the different views and find a creative solution that could gather consensus²²⁶. At the same time, some States asked to avoid a regression of what was agreed at the Review Conference, since the discussions held in Kampala were being replicated in New York. It was also recognized, mainly by the supporters of camp-protection, that the call for certainty and clarification of the legal interpretations could not encroach on the judicial function of the ICC and the independence of the judges, also because the ASP does not have those functions²²⁷.

Later on, Cyprus submitted a proposal that tried to combine the several elements that were previously introduced, that became known as the “simples plus approach”²²⁸. It joined the previous three proposals with the aim of giving the Court all the elements that would help the judges achieve a conclusion regarding the jurisdictional regime. It introduced the idea, that was previously explained²²⁹, mainly supported by camp-protection, of distinguishing between enter into force or being bound and the jurisdiction of the Court.

However, it eliminated the core sentence of the proposal by UK/France, which is the second sentence of article 121, paragraph 5, that states that “the court does not exercise its jurisdiction in respect of that crime when committed by a national of a State Party which has not accepted such amendments or in the territory of that State”. As already explained, this was the fundamental argument of the supporters of camp-consent, so when eliminated, it instantly meant the disagreement of these States.

²²⁶ A deserved mention should go to Brazil, that tried to bring new proposals to the table, although with little success.

²²⁷ According to article 112 of the Rome Statute.

²²⁸ Due to reasons of confidentiality and publicity, not all documents circulated during these processes can be annexed to this paper.

²²⁹ See Part II – section c) – lit. ii).

In addition, a discussion paper was presented by Professors Kreß and Akande²³⁰, also called “non-german non-paper”, containing elements of activation with the aim of eliminating the practical relevance of the declaration of non-acceptance, by providing that it may be done by any reasoning, individually or collectively, and also recognizing the fundamental divergence between the two camps. Delegations recognized that this paper put forward the two points of view that would prove essential to enable the decision-making during the ASP, namely the recognition of the two camps and the operationalisation of the opt-out, but that proved to be overly academic for an activation decision and was disregarded almost instantly.

The negotiations were mainly a political discussion between the bigger States, that would more likely be subject to the jurisdiction of the Court over the crime of aggression, and the smaller States, that were trying to get protection against the possibility of such an act. Moreover, it was a very frustrating exercise, because while some States demonstrated some flexibility in the drafting of the resolution that would be adopted, others were quite the opposite, threatening not to join consensus if their position was not adopted²³¹, or what was informally called “take-it-or-leave-it” approach. Unfortunately, this position was mainly shared by the States that supported the narrow view in their efforts to remove the ambiguity of the Rome Statute, such as the UK and France.

Regarding the opt-out, there was some restlessness about the value of this declaration, exactly as Professors Kreß and Akande recognized, when they presented the “non-german non-paper”. There was the apparent belief that the opt-out would have a high value of importance of political nature, because it was a declaration to the world that a specific State would not grant protection to itself and to others if a crime of aggression were to be committed. During the facilitation, delegations, especially those trying to be pragmatic, tried to clarify this issue and reached the conclusion that a declaration of non-acceptance of the jurisdiction of

²³⁰ Two of the experts that briefed the delegations during the facilitation and authors of much of the doctrine existing on the subject of the crime of aggression, in their capacity as academics.

²³¹ Also recognized in the ASP Report ICC-ASP/16/24 (27 Nov. 2017), *op. cit.*, para. 14.

the Court would not need to include a “valid” reasoning, it would simply be a declaration made by a State that it would not accept the jurisdiction of the Court.

This was reflected in a subsequent discussion paper presented by the Facilitator, that focused on the opt-out by clarifying that it “may consist of any statement made by or on behalf of a State Party, individually or collectively, in which it expresses that it does not accept, for whatever reason, that the Court may exercise jurisdiction over a crime of aggression arising from an act of aggression allegedly committed by that State Party”.

Despite these efforts, no concrete results came out of the facilitation process, unless the determination by States of maintaining their positions and a deep sense of hopelessness going into the ASP. However, delegations still remained committed to working together and activating the Court’s jurisdiction in 2017.

b. 16th session of the ASP

With this backdrop, the ASP started on 4 December 2017, with statements by Sidiki Kaba, then President of the ASP, and O-Gon Kwon, President elect of the ASP, asking for the activation of the jurisdiction of the Court over the crime of aggression; and the Prosecutor of the ICC, Fatou Bensouda, foreseeing that this ASP “promises to be hardly less demanding with some critical decisions before the States Parties that will chart the course of the International Criminal Court in the years ahead”²³².

The efforts to reach a consensual decision of activation continued in the same line as during the facilitation process, but under the name of informal consultations. As such, it was also characterised by a myriad of proposals²³³, that were controversial, either for camp-consent, either for camp-protection, failing to address the position of the other part.

²³² All statements available at https://asp.icc-cpi.int/en_menus/asp/sessions/documentation/16th-session/Pages/Statement.aspx.

²³³ Not all proposals introduced at the ASP will be discussed in this paper, some will be chosen, that present interesting or out of the ordinary ideas and prove relevant to the subject of this paper.

Worth mentioning is the proposal submitted by Brazil and Portugal, that took a creative route of understanding the opt-out as a way to bridge the gap between the two views. New Zealand later joined this proposal, making it fully represented, since Portugal, represented camp-protection for it had already ratified the Kampala amendments, New Zealand as the representation of camp-consent, and Brazil in the middle, due to the fact that was still in the process of changing its national legislation before proceeding with ratification.

Briefly, the pragmatic approach that these countries suggested was the creation of a list, annexed to the resolution to be adopted, with the States Parties that declared not to accept the jurisdiction of the Court over the crime of aggression, concerning nationals of these States Parties. This new mechanism would be something separate from the opt-out and there were several attempts to operationalize it.

The idea of this list was to make the declaration of non-acceptance of the jurisdiction of the Court over the crime of aggression politically irrelevant, since it would be done in the context of the ASP (although the possibility of making it later was also included, according to the deadlines demonstrated below), not requiring any type of reasoning for such declaration to be made, resulting in the fact that it would be less damaging for the State's image to be outside the Court's jurisdiction. The idea of irrelevance of the declaration of non-acceptance was actually already suggested by Professors Kreß and Akande, as demonstrated with what was called the "non-german non-paper".

However, some delegations expressed their concerns regarding the legality of this mechanism and the competences of the ASP to create it, recalling the sensible nature of the crime of aggression, since it deals with the indictment of Heads of State. Other concerns were raised concerning the timing of the declaration of non-acceptance of the jurisdiction, since many delegations needed to consult with their competent State authorities, thus leading to the necessity of having an extended deadline and consequently no concrete activation on the 16th session of the ASP.

Several attempts at agreeing on a deadline were made. At first, the deadline for making a declaration as proposed by these countries was 9 March 2018, symbolically relevant because it marked the beginning of a new cycle of judges in the ICC. The next proposal was 31 December 2018, which would allow the finalization of national processes within that year, which was itself problematic, because delegations were concerned that the countries blocking consensus would find a way not to activate the Court's jurisdiction in the 17th session of the ASP. The deadline changed once again for 17 July 2018 and was maintained in the final draft, as will be explained below.

The next proposal was introduced by Norway, reflecting the narrow view. It was supported by those who shared the same position. For the other camp, however, the main problem, besides the fact it confirmed a different position from the one they advocated, was that the context of the ASP in that moment was of pragmatic discussions, to try to incorporate all positions, an attempt mostly led by Brazil and Portugal. When the room received that proposal, it seemed that it had set the discussions back to the facilitation and it was interesting to see how delegations kept their diplomatic approach until the end, even when the discussions seemed on replay.

At this point, the only consensus found in the room was that there was no consensus. Several proposals were on the table, but none of them satisfied both camps, thus the facilitator decided to introduce a discussion paper that laid out three options: Option 1 - simple activation, without mentioning legal interpretations, as proposed by Switzerland; Option 2 - camp-consent, confirming application of article 121, paragraph 5; and Option 3 - a compilation of ideas presented by States Parties, with special focus on the possibility of making a declaration of non-acceptance of the jurisdiction, through the inclusion in the above-mentioned list, in order to make this declaration not as politically-charged as it was considered to be.

The first option was preferred by eighteen delegations, with several of them supporting Option 3 as well, that being the compromise solution, thus gathering in

total the support of thirty-three delegations. Only about eight delegations expressed their support for Option 2, with some of them showing flexibility towards Option 3.

Two conclusions can be drawn. First, that almost two-thirds of States Parties did not pronounce themselves over which position they took preference regarding the interpretation of the Kampala amendments, and second, that the decision to activate the jurisdiction was being blocked mainly by camp-consent, represented by the powerful countries and simultaneously Permanent Members of the UNSC, that were the proponents of such vision from the beginning.

During the final days of the ASP, when discussions over the crime of aggression became more frequent and long, a consensual decision seemed nowhere in sight. At some point, there was a restlessness in the room and it was apparent that there were some mental calculations being made. This is to say, delegations started considering the hypothesis of a vote and were trying to see how many States Parties would support camp-protection and camp-consent, considering the requisite of a two thirds majority for the decision to be taken²³⁴. It cannot be understated how damaging it would be for the ICC to vote on a question of such political relevance, that would divide the States Parties and that would affect the legitimacy of the Court.

When the final day of the ASP arrived, no consensus had been achieved in neither of the proposals submitted²³⁵. The facilitator then decided to give up her functions and transfer the work to the Vice-Presidents of the ASP, Ambassadors Sebastiano Cardi and Sergio Ugalde, to decide what would be the next steps.

Already in plenary of the ASP, the Vice-Presidents informed delegations that they would submit a final proposal, in order to reach consensus and that would not be open to negotiations. However, the negotiations on this draft text were not

²³⁴ According to articles 15 *bis* and 15 *ter*, in identical paragraphs 3, a decision of activation as to be taken by the same majority of States Parties that is required for the adoption of an amendment. In this case, article 121, paragraph 3, of the Rome Statute applies.

²³⁵ At least 20 different proposals and discussion papers were considered throughout the facilitation and the ASP.

done in an open and transparent setting, instead it required closed meetings, that facilitated, nevertheless, the reaching of a common ground. Interestingly, this proposal, in its first draft, reflected the position of camp-protection by establishing that the amendments do not apply to any national of a State Party that has not ratified or accepted them and by omitting the reference to the territory of a State Party, thus permitting the Court to exercise jurisdiction when an allegedly crime of aggression was committed in the territory of a State Party.

Additionally, the resolution failed to mention the trigger mechanisms of the jurisdiction of the Court, thus determining that the exercise of jurisdiction in the case of State referral or *proprio motu* would be identical to a UNSC referral, which is not in line with the Kampala amendments, as was demonstrated above²³⁶. However, soon after, this paragraph was updated to include the previous omissions, even though it was a *no-further-negotiation* proposal. If it was truly a “technical mistake” or it was subjected to some pressure of the powerful countries to be changed we will never know, but the final draft ended up confirming the position of camp-consent.

The Vice-Presidents had, nevertheless, the expertise of introducing an attempt at easing this concession made by camp-protection. The paragraph in question reads as follow: “3. Reaffirms paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court”. This was the final effort of camp-protection to give the Court some margin of manoeuvre and to ensure that it would decide about its own jurisdiction irrespective of what position gathered consensus.

Although, it is included in the competences of the judges for them to decide on the jurisdiction of the Court, taking into account the legal interpretations of the Kampala amendments and decide accordingly to international criminal justice and within the Rome Statute framework. Such inclusion was, of course, still subject of discussion in the room, with camp-consent strongly advocating for its elimination,

²³⁶ See Part II – Section c).

while camp-protection defended to maintain the provision that at least (minimally) balanced the confirmation of article 121, paragraph 5.

Additionally, the deadline mentioned before prevailed in the draft resolution, now delaying activation until 17 July 2018, date of the 20th anniversary of the Rome Statute, as a way of allowing States to update national legislations and make the necessary arrangements, either to ratify or to opt-out - although by confirming the interpretation of camp-consent, the opt-out becomes quite irrelevant, since ratification is always necessary for the Court to exercise jurisdiction.

In plenary, before taking action on the draft resolution, several countries exercised their right of making an explanation of vote, that actually resembled more a drafting exercise, than an actual explanation of vote, either to raise concerns, to ask for consensus or to ask for flexibility.

The feeling in the room was of uncertainty whether actual consensus would be reached or not, because the advocates of camp-consent were still unsure about the insertion of a provision recalling the independence of the judges and of the Court that would still undermine the certainty that they required; while the advocates of camp-protection were discouraged with the “victory” of the other position that represented a major setback in the development of international criminal justice, but continued in their struggle to adopt an activation decision.

As a reflection of the political significance that the activation of the jurisdiction of the Court over the crime of aggression represents, the disagreement went until the last minute, where advocates for camp-consent tried to replace the provision on the independence of the Court included in an operative paragraph by a preambular paragraph, as to give it less importance. Of course, this was a subjective and a bit pointless exercise, since the substantial matter of this provision consists of two articles of the Rome Statute, which have to be complied by States Parties.

Finally, the moment to take action on the draft resolution arrived with the room unsure of what the result would be²³⁷. When the Vice-Presidents asked if any delegation opposed to the adoption of the draft resolution and silence ensued, the gavel hit the table, the room exploded into applause and the decision to activate the jurisdiction of the International Criminal Court over the crime of aggression was adopted²³⁸.

c. Resolution on the Activation of the Jurisdiction of the ICC over the Crime of Aggression

The struggle that characterised the facilitation and the ASP, and, in truth, the past 20 years, concerning the crime of aggression is a true reflex of the controversy of this issue and that is why the final result did not satisfy every delegation, although the interests of some were more accommodated than others.

Ultimately, the confirmation of the narrow view and the restriction of the jurisdiction of the Court was the “price to pay” for the crime of aggression to finally be subject to its jurisdiction and become effective in the international criminal framework. For the supporters of camp-protection and for everyone that, even without agreeing with any of the positions, wanted the jurisdiction activated, it was more important to achieve such milestone than to try to keep fighting for a position that did not gather consensus, regardless of what interpretation should have prevailed.

The confirmation in the above-mentioned Resolution will mean that the ratification of States Parties of the amendments will always be required, regardless of it being a victim or an aggressor State. This represents an effort to preserve the

²³⁷ KREß and HOLTZENDORFF report that the same uncertainty plagued the Review Conference in 2010, with delegations waiting for UK and France to break the silence. Interestingly, this may have represented a kind of déjà vu for some diplomats present both in Kampala and then in New York. In KREß, Claus and HOLTZENDORFF, Leonie von (2010), *op. cit.*, pp. 1179-1180.

²³⁸ ASP Resolution ICC-ASP/16/Res.5 (14 Dec. 2017), on the activation of the jurisdiction of the Court over the crime of aggression, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf.

sovereignty of the States, with the express basis of the exercise of jurisdiction being a declaration of consent.

LAMOUNIER thinks of “sovereignty as a relation of independence between States in the international context and, at the same time, the position of equality between them” (my translation)²³⁹. In this case, taking into account the jurisdictional regime of the ICC over the crime of aggression, it could be argued that sovereignty seems to be more about the relation of independence than equality, because, as demonstrated throughout Part II, States will be left in deeply asymmetrical positions, some being covered by the crime of aggression and the majority of them not. Into this mix, it should additionally be considered the fact that crimes against humanity, genocide and war crimes will have a totally different jurisdictional regime, creating a fragmented system between the core crimes established in the Rome Statute.

Indeed, and according to HELLER, as it stands, the crime of aggression regime establishes a “la carte approach to the ICC’s jurisdiction”²⁴⁰. On top of that, by confirming the narrow view, it is imposing a highly restrictive jurisdiction of the Court over the crime of aggression, that was already so when it came out of Kampala, with the exclusion of nationals of non-States Parties and the possibility of the opt-out, and now even more so with the exclusion of nationals of States Parties that have not ratified²⁴¹.

One could question the legal value of the Resolution adopted, and if it could, for example, constitute an element of interpretation of the Kampala amendments, according to article 31 of the VCLT, thus constituting subsequent agreement²⁴². However, as suggested by DÖRR, the Resolution would have to demonstrate that

²³⁹ LAMOUNIER, Gabriela - *Reflexões sobre o Tribunal Penal Internacional*. Belo Horizonte: Ed. Logistic, 2011, p. 65. *Apud* STEINER, Sylvia Helena and BRANT, Leonardo Nemer Caldeira (2016), *op. cit.*, pp. 1605-1606.

²⁴⁰ HELLER, Kevin Jon (13 Jun. 2010), *op. cit.*

²⁴¹ ASP Report ICC-ASP/16/24 (27 Nov. 2017), *op. cit.*, Annex II – section C - Paper submitted by Argentina, Botswana, Samoa, Slovenia and Switzerland (August 2017), p. 26.

²⁴² Brownlie explains it as an agreement made by the parties about the interpretation of a treaty or in its application. In BROWNLIE, Ian – *Principles of Public International Law*. 4th Edition. Oxford: Oxford University Press, 1990, p. 629.

all parties intended to adopt a certain interpretation, in this case the confirmation of the narrow view²⁴³.

As was thoroughly explained, the *travaux préparatoires* of this Resolution showcase the deep divergence between the parties, preventing such Resolution of forming a primary means of interpretation. The Resolution itself can, however, be a secondary means of interpretation to the Court, under article 32 of the VCLT, as part of the preparatory work that characterises the criminalisation of aggression in the Rome Statute.

In fact, the Resolution will not bind the Court *per se*, because the judges have the judicial discretion to resolve matters related with their own exercise of jurisdiction, and, as such, they will consider the fundamental differences that exist in the interpretation of the conjunction of the Kampala amendments and the Rome Statute. One could argue, nevertheless, that such discretion by the Court does not mean that the Resolution will not have any effect whatsoever. It has some binding effect, since it was adopted by consensus on an ASP, with powers to do so, even though several States Parties were not present, and the consensus achieved was not “real consensus”.

The truth may be that it will be more helpful not to question the legal effect of the Resolution itself, but rather value the discretion and independences of the judges in deciding such matters. Both are established in articles 40 and 119 of the Rome Statute and reaffirmed in operative paragraph 3 of the Resolution.

Furthermore, CORACINI suggests that the Resolution adopted has some positive elements, read in conjunction with the Kampala amendments: the fact that all trigger mechanisms apply to the crime of aggression, such as the universality of the UNSC referral regarding crimes of aggression and the possibility of State referrals and *proprio motu* investigations, although with some particularities²⁴⁴; and additionally safeguarding the independence of the ICC and its judges, both

²⁴³ DÖRR, Oliver and SCHMALENBACH, Kirsten (2012), *op. cit.*, pp. 553-554.

²⁴⁴ Described thoroughly in Part II – section c).

now with this recognition in the Resolution, but also previously when considering the role of the UNSC in the determination of an act of aggression²⁴⁵.

Albeit these positive elements, the conclusion is that cases dealing with aggression are going to be a rare exception in the ICC, since its jurisdictional reach is extremely limited, as demonstrated in Part II, by excluding non-States Parties and non-ratifying States Parties.

²⁴⁵ CORACINI, Astrid (2 Jul. 2010), *op. cit.*

IV. FINAL CONSIDERATIONS

The activation of the jurisdiction of the International Criminal Court over the crime of aggression represented a milestone in the development of international criminal law.

Ever since Nuremberg, the international community had been trying to recognize aggression as the most atrocious of international crimes, as a further step in the fight against impunity and in the protection of human rights. This had partly been accomplished in 1998 by the Rome Statute by punishing those responsible for crimes against humanity, genocide and war crimes. Already at the time, there was the recognition that aggression belonged to that list, as a way to ensure the prohibition of the illegal use of force as set out in the Charter of the UN and by offering protection to States that may be victims of aggression. Complementarily, the criminalisation of aggression would act as a deterrent since persons in positions of power or control of a State would be subject to the jurisdiction of the Court, therefore prevent aggressive war-making²⁴⁶.

As has been demonstrated, the crime of aggression represents a highly complex matter, one that took several years for States to try and reach a compromise solution. If one goes back in history, all through the major events, the Rome Statute, the Kampala amendments, and now the activation in New York, some similarities appear: negotiations were long, there was a prolonged absence of consensus and thus concessions had to be made. The conclusion drawn from the present solution, however, is that this compromise tends to be more one-sided, favouring one position.

In Rome, States agreed to a broad provision that delayed the definition and the conditions of jurisdiction for a later stage, when the international community would be more willing to deal with such matter. In Kampala, a compromise-solution was found in the creation of the mechanism of opt-out, in order to

²⁴⁶ WENAWESER, Christian and ALAVI, Sina – “From Nuremberg to New York: The Final Stretch in the Campaign to Activate the ICC’s Jurisdiction over the Crime of Aggression”. *Harvard International Law Journal* - Online Journal. Vol. 58 (2017). p. 21.

accommodate the existing divergent positions, but mainly to accommodate UK and France's concerns. In New York, there was the full acknowledgment of the same position, the narrow view, with full disregard for the States that wanted to ensure more protection for their territories, but that simultaneously meant more accountability for their own nationals. Alongside these compromises, a delay on the beginning of the exercise of jurisdiction for a later stage has also been agreed upon, that began at Nuremberg and took almost a century to finally be criminalised and enforced.

This fundamental disagreement comes from the fact that the crime of aggression is a highly politicized matter, where State representatives use legal arguments to mask interests and intentions of the respective State. Indeed, it was definitely what happened, at least, during the past 20 years with the discussions on aggression, that by their very nature involve matters of high sensitivity, such as immunities of Heads of State and State responsibility. BROWN suggests, that opposing to politicization, some legalization has already been achieved in international criminal law, by imposing international legal constraints on governments, namely in terms of States powers, including sovereignty, since they are "limited by treaty obligations, the rights of other States and by international human rights standards, even when no effective international enforcement mechanisms are available"²⁴⁷.

As a matter of fact, the Rome Statute is a full accomplishment of this idea of legalization, by codifying international customary law and even by applying a jurisdictional regime that grants quite more protection as one would have ever expected, in regard to crimes against humanity, genocide and war crimes. Of course, as this paper has demonstrated, the crime of aggression poses a different situation, that proved very difficult to legalize.

According to this author, the Rome Statute introduces several safeguards against politicization, such as the conditions on the exercise of jurisdiction, based

²⁴⁷ BROWN, Bartram S. – "Depoliticizing Individual Criminal Responsibility". In SADAT, Leila N. and SCHARF, Michael P. – *The Theory and Practice of International Criminal Law – Essays in Honor of M. Cherif Bassiouni*. Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008. p. 106.

on both nationality and territoriality; also the adoption of narrow definitions of some of the crimes within the jurisdiction of the ICC; the confirmation of the principle of complementarity, which limits the jurisdiction of the ICC to situations where States are unwilling or unable to prosecute²⁴⁸; and various procedures by which interested States or individuals can challenge any ICC investigation or prosecution before a Pre-Trial Chamber²⁴⁹.

Indeed, these processes of legalization were marked by the blocking of two of the world's potencies, UK and France, the only two nuclear powers and Permanent Members of the UNSC that are States Parties to the Rome Statute, of achieving consensus and a solution that would accommodate the majority of States Parties. This comes as an effort by these States to establish a "myriad of safeguards"²⁵⁰, through political processes, to ensure that UNSC retains its power to determine when there is a threat to peace, a breach of the peace, or an act of aggression, under Chapter VII, and to take any measures to maintain and restore international peace and security²⁵¹.

The negotiations at the ASP and the subsequent adoption of the Resolution were a result of an intense diplomatic process, which required a lot of expertise by the delegations. The process was especially interesting, because some delegations presented a higher-level preparation, such as the UK and France, who had several diplomats working in their position, while the rest of the States were represented by only one or two diplomats. It became evident that the work capacity was truly different, and such was plastered in the final result.

Is there hope for the future?

Taking into account the two functions of the ICC, one has to question if they are being accomplished in the case of the crime of aggression and the way it

²⁴⁸ Articles 1 and 17 of the Rome Statute.

²⁴⁹ BROWN, Bartram (2008), *op. cit.*, p. 110. The same is identified by SCHABAS, William A. (2004), *op. cit.*, p. 189, that describes it as an attempt to reduce or eliminate judicial discretion.

²⁵⁰ OLASOLO, Hector and CARCANO, Lucia – "The ICC Preventive Function with Respect to the Crime of Aggression and International Politics". *Harvard International Law Journal - Online Journal*. Vol. 58 (2017). p. 69.

²⁵¹ *Ibidem*.

is established in the amended Rome Statute. Is this solution contributing to the prevention of the most heinous of crimes, which require proactive action from the ICC and the international community, to avoid the perpetration of the most atrocious of human rights violations and also to help end them when they have already started? Is it promoting a culture of accountability, that the international community agreed to build in 1998, that reinforces “core societal values” and sends the message to the world that a crime committed by a person in a position of power or control will not escape unpunished²⁵²? The answer to these questions is two-fold.

Firstly, the crime of aggression’s negotiation history and the difficulties faced throughout these past 20 years, steer the conclusion for the importance that this issue represents, relating with human rights, but also with international relations. One would hope that when a solution was found for this dilemma it would have a significant effect in the world and would ensure a culture of accountability, considering that we are dealing with the *supreme international crime*.

The truth is that the crime of aggression, as it is presently established, will have a minimal practical effect, because the scope of jurisdiction of the Court is also minimal. Only 35 States Parties have ratified the Kampala amendments and considering that the ASP confirmed the position that maintains that the jurisdiction of the Court is excluded in relation to nationals or in the territory of States Parties that have not ratified the Kampala amendments, even if the victim State Party has ratified, only acts of aggression committed by nationals of those 35 States Parties will fall under the jurisdiction of the Court. What is more, the majority of States that have ratified are European countries, making it very unlikely that one of these countries would ever commit an act of aggression against another. HELLER, already in 2010, predicted that the jurisdiction of the Court would “almost certainly be limited to states that do not have either the motive or the wherewithal to commit the crime in the first place.” Also, VAN SCHAACK identifies that the States more

²⁵² *Idem*, p. 67.

likely to violate the prohibition on the illegal use of force by committing an act of aggression will be those that are not members of the Court, that will choose not to ratify the Rome Statute, concluding that this activation will mean “going ahead with an empty shell that will only complicate the life of the Court”²⁵³.

Secondly, the importance of a decision of activation on 14 December 2017, and especially by consensus, considering the state of the world, the instability that ensues and the constant violations of human rights, has to be taken into account and balanced with the absence of a greater margin of protection of States. That was exactly what the delegations in New York did and that is why consensus was achieved. The message sent to the world that the International Criminal Court had activated its jurisdiction over the crime of aggression, showing unity and condemning such acts, was of higher value than to prevent that from happening by giving more importance to the legal ramifications of this particular matter.

As such, the process of the international legal order conforming with the rule of law started with the Nuremberg trials, by recognizing that political leaders could not go unpunished for the offenses they committed. Even though in the following years the process was blocked, it started to develop with the creation of the two ad hoc tribunals in the early 1990s²⁵⁴, which transferred to international judicial organs the decision of prosecution and convicting perpetrators of atrocious international crimes.

Presently, by allowing a permanent international criminal court with jurisdiction to try the most atrocious crimes that plague the international community, it contributes to the establishment of an international criminal order, that relies on an independent and fair judiciary to punish those who commit international crimes, that affect the international community as a whole, especially considering the violations of human rights that ensue in such cases.

²⁵³ SCHAACK, Beth Van – “The ICC Crime of Aggression and the Changing International Security Landscape”, *American Society of International Law* (16 Apr. 2015), available at <https://www.asil.org/blogs/icc-crime-aggression-and-changing-international-security-landscape>.

²⁵⁴ SOARES, Miguel Serpa de (2017), *op. cit.*, p. 40.

Hence, the Kampala amendments and the Resolution adopted are important factors for the strengthening of the international rule of law, because these instruments recognize the application of legal standards and the separation of powers, for instance through the fact that the ICC is not (totally) dependent on the UNSC. Furthermore, it recognizes that the waging of wars is no longer acceptable, constituting a direct violation of international law, especially international criminal law and international human rights law, which are victim-centred and have their main aim the protection of human rights.

However, as it stands, there are very little chances of ensuring individual criminal responsibility for the waging of aggression by one State against another. The hope is now that more and more countries will ratify the amendments and that in the meanwhile the UNSC will refer cases to the ICC when an act of aggression is committed. The role of the UNSC and also the ICJ will, therefore, be essential in this aspect for guaranteeing an end to impunity of these atrocities and act as a deterrent for future crimes.

By ratifying the Kampala amendments, States are also choosing to criminalise aggression in their domestic jurisdictions, by virtue of the principle of complementarity²⁵⁵ established in articles 1 and 17 of the Rome Statute²⁵⁶. Not only the seriousness of aggression would be exposed internationally and subject to the international jurisdiction of the Court, but also it would gain a different level of condemnation if States would implement it in their national legal orders, contributing to the prevention of these acts and ensuring accountability at the national level.

The hope must also lie on the belief that some non-States Parties, by not being included in the ICC system, will fear being victims of acts of aggression and by not being in the reach of the exercise of jurisdiction of the Court, will want to

²⁵⁵ The ICC can only intervene when the State in question is unable or unwilling to carry out an investigation or prosecution.

²⁵⁶ WENAWESER, Christian and ALAVI, Sina (2017), *op. cit.*, p. 22.

join the Rome Statute to receive an added layer of protection²⁵⁷. And maybe, in some years, the international community and international law, especially international criminal law, will have reached a breakthrough where new amendments can be adopted, namely to article 121, paragraph 5, or article 15 *bis*, paragraph 4 and 5, of the Rome Statute, eventually to create a uniform jurisdictional regime common to all core crimes²⁵⁸.

And finally, let's hope that in 17 July 2018, the true activation of the jurisdiction of the ICC over the crime of aggression will take place, exactly 20 years after the adoption of the Rome Statute, revealing a kind of imperfect harmony to the ICC system.

²⁵⁷ SCHABAS, William A. – “The Kampala Review Conference: A Brief Assessment”. *PhD studies in human rights* (17 Jun. 2010). Available at <http://humanrightsdoctorate.blogspot.pt/2010/06/kampala-review-conference-brief.html>.

²⁵⁸ CORACINI, Astrid (2 Jul. 2010), *op. cit.*

CONCLUSION

This paper begins with an explanation of the work carried out during a four-month internship in the Permanent Mission of Portugal to the United Nations, which turned out to be an excellent learning experience, both professionally and personally.

Throughout the internship, the opportunity presented to work with admirable supervisors and colleagues that accompanied me in the journey of understanding the UN system. By working in real-life issues that involved the 6th Committee, the Security Council, the Peacebuilding Commission and the Assembly of States Parties, an insight of how international relations work, of what are the different dynamics between States and how to (attempt to) manage them to ensure progress in the international community, was achieved.

Additionally, by having contacted with different organs of the UN and also in the margins of the UN, such as the ASP, an interdisciplinary internship was completed, helping me figure out my main areas of interest, but proving to be enlightening regarding some issues that I was not aware of in the first place. The opportunity of seeing international law in action was, therefore, an accomplishment that permitted the consolidation of my interest for this area and the realisation that international law is increasingly more important, especially as a means of protection of human rights and the setting of legal standards.

In this sense, especially the opportunity to attend the 16th session of the ASP was incredibly gratifying. Considering that the ICC was created under a rules-based international order and realising the importance of the discussions that took part in the ASP about the crime of aggression was extremely fulfilling, as well as being able to observe how the delegation of Portugal had an essential role to play.

The observation and the participation in an intense and difficult diplomatic process that resulted in an activation decision was also very interesting and rewarding. The dynamics between States were very delineated and especially considering the power to block the advancement of international criminal law

possessed mainly by the stronger States. Even though the decision taken was not the preferred one, the road that led to New York in 2017 was incredibly challenging and the solution was not at all obvious, considering the arguments of each interpretation of the Rome Statute and the Kampala amendments.

The decision to activate the jurisdiction of the Court, although not in effect until 17 July 2018, is a key breakthrough in international law, international relations and in the protection of human rights. As was argued, however, this is not enough. A step further must be taken to fight impunity and guarantee an international system based on the rule of law, given that the present regime will have little or no practical effect in the exercise of jurisdiction by the ICC. The future steps will be efforts to increase the number of ratifications of the Kampala amendments, for example through the raising of awareness, until it is viable for States Parties to propose new amendments to the regime established for the crime of aggression and ensure an effective system of accountability.

As such, through the internship and the areas addressed, as for instance a more legislative/regulatory approach by the 6th Committee or by the ICC-ASP, or a more practical/in the ground work exemplified by the UN-PBC or even by the UNSC, something was very clear. That we cannot, as the international community and in the present conjuncture, allow a regression on the development of international law, especially international criminal law, and in the universal protection of human rights. Crisis in Syria, Myanmar, Democratic Republic of Congo, and so much more, require the international community as a whole to take action and to enforce a system of prevention and accountability for the most serious crimes.

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ANNEX I

Elements of an activation decision presented by delegations*

1. Elements presented by Switzerland

The Assembly of State Parties,

PP1 Recognizing the historic significance of the consensual decision at the Kampala Review Conference to adopt the amendments to the Rome Statute on the crime of aggression, and in this regard recalling resolution RC/Res.6,

PP2 Recalling its resolve to activate the Court's jurisdiction over the crime of aggression as early as possible, and noting with appreciation that the conditions for the activation of the crime of aggression according to paragraphs 2 and 3 of article 15 bis and ter of the Rome Statute have been met,

PP3 [Place holder to reference the report on the activation of the jurisdiction of the International Criminal Court over the crime of aggression containing all views],

OP1 Decides to activate the Court's jurisdiction over the crime of aggression in accordance with paragraph 3 of article 15 *bis* and *ter*,

OP2 Renews its call upon all States Parties to ratify or accept the amendments to the Rome Statute on the crime of aggression.

2. Elements presented by France and the United Kingdom

Recalls that in accordance with Article 121 (5) of the Rome Statute, amendments relating to the crime of aggression enter into force with respect to States Parties that have accepted them one year after the deposit of their instrument of ratification or acceptance and that the Court does not exercise its jurisdiction in respect of that crime when committed by a national of a State Party which has not accepted such amendments or in the territory of that State.

* Included in Annex III of Report adopted by the Assembly of States Parties ICC-ASP/16/24 (27 Nov. 2017), on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression.

3. Elements presented by the State of Palestine

Recalling that article 15 bis, paragraph 4, of the Rome Statute stipulates that the Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction.